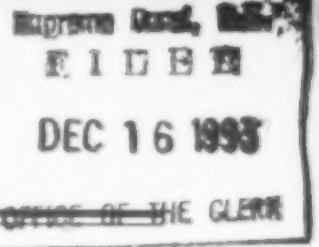


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No. 92-1949



IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 8, 1993
CERTIORARI GRANTED NOVEMBER 1, 1993

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CHRONOLOGY OF PROCEEDINGS

<u>Event</u>	<u>Date</u>
<i>Court-Martial Charges:</i>	
Charges Preferred:	11 January 1989
Charges Referred to Court-martial:	11 January 1989
Charges Served on Petitioner:	11 January 1989
<i>Court-Martial Proceedings:</i>	
Petitioner Arraigned:	13 March 1989
Motions to Suppress Presented, Argued, and Decided:	15 and 16 March 1989
Evidence on the Merits Begun:	20 March 1989
Verdict Announced:	12 April 1989
Sentence Announced:	13 April 1989
<i>Post-Trial Action:</i>	
Staff Judge Advocate's Recommendation to the Convening Authority made:	29 June 1989
Convening Authority's Court-martial Order and Action promulgated:	24 July 1989
<i>at the Navy-Marine Corps Court of Military Review:</i>	
Case Docketed:	10 August 1989
Defense Assignments of Error and Brief filed:	06 March 1990
Government Reply to Defense Assignments of Error and Brief filed:	02 May 1990
Defense Response to Government Reply Filed:	07 May 1990
(Note: this pleading was misdated as March when filed).	

CHRONOLOGY OF PROCEEDINGS - Continued

<u>Event</u>	<u>Date</u>
<i>at the Navy-Marine Corps Court of Military Review</i>	
<i>(continued):</i>	
Issue Specified and Ordered Briefed by Court:	24 January 1991
Defense Brief on Specified Issue filed:	25 February 1991
Government Reply to Defense Brief on Specified Issue filed:	27 March 1991
Defense Response to Government Reply filed:	11 May 1991
Case Argued before Court:	13 June 1991
Case Decided:	16 September 1991
<i>at the United States Court of Military Appeals:</i>	
Petition for Grant of Review Filed by Petitioner:	19 November 1991
Supplement to the Petition for Grant of Review filed:	20 December 1991
Government's Opposition to Petition for Grant of Review filed:	30 December 1991
Review Granted by Court:	11 February 1992
Defense Brief filed:	12 March 1992
Government Brief filed:	13 April 1992
Case Argued before Court:	03 November 1992
Case Decided:	11 March 1993

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA

versus

ROBERT L. DAVIS, OSSA, USN

MOTION TO SUPPRESS STATEMENTS

COMES NOW the Defendant, Robert L. Davis, through his undersigned attorneys, does hereby moves [sic] to suppress any and all written or oral statements or admissions which the Government intends to introduce at the Defendant's trial, and which the Government contends were made by the Defendant. The within Motion is made on the grounds that any such statements were not intelligently, knowingly and voluntarily made and were obtained in violation of the Defendant's rights against self-incrimination and rights to counsel as guaranteed by the Constitution of the United States of America.

Furthermore, the Defendant demands strict proof that any statement given was made subsequent to the Defendant being advised of his rights pursuant to Article 31, UCMJ, 10 U.S.C. 3831.

/s/ Andrew J. Savage, IIIANDREW J. SAVAGE, III
Civilian CounselD. S. YANDLE
LT, JAGC, USN
Detailed Defense Counsel

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA

versus

ROBERT L. DAVIS, OSSA, USN

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, Robert L. Davis, through his undersigned attorneys, does hereby moves [*sic*] the Court for an Order suppressing from evidence at Defendant's trial, pool cues illegally obtained from the Defendant.

On or about October 20, 1988, the Defendant was approached by NIS agents and was questioned as to his possession and ownership of pool cues. At that time, NIS considered a contributing cause of death of the decedent in question to be blunt head trauma. Accordingly, NIS considered the Defendant as a suspect, as evidenced by its request to Defendant that he turn over the pool cues owned by him.

The Defendant, however, was not given his rights under Article 31, UCMJ, 10 U.S.C. Section 831, prior to his interrogation by the NIS agents. Since the Defendant was not advised that he was a person suspected of an offense, that he had the right to remain silent, and that any statement made could be used against him, the evidence seized should be suppressed. [10 U.S.C. Section 831(d)]. The Defendant's action of turning over the pool cues constitutes a communicative act for the purposes of Article 31. More-

over, the failure to advise the Defendant of these rights should render any consent by the Defendant invalid under the totality of the circumstances involved.

WHEREFORE, the Defendant requests these pool cues be suppressed from evidence at the Defendant's trial. The Defendant intends to present evidence and desires to make oral argument in support of this Motion.

/s/ Andrew J. Savage, III

ANDREW J. SAVAGE, III
Civilian Counsel

D. S. YANDLE
LT, JAGC, USN

Detailed Defense Counsel

I hereby certify that a copy of the above motion was served upon trial counsel this ____ day of March 1989.

D. S. YANDLE
LT, JAGC, USN

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES

v.

ROBERT L. DAVIS, OSSA, USN

RESPONSE TO MOTION TO SUPPRESS STATEMENTS

Comes now the United States in response to Defendant's motion to suppress statements. Defendant's motion lacks specificity, failing to identify the statements or admission in question or to specify "facts" underlying Defendants position that all statements/admissions were not intelligently, knowingly or voluntarily made, and were obtained in violation of Defendants right against self-incrimination and right to counsel.

To the extent Defendant's motion may cover Defendant's conversation with OS2 Ronald S. Mull, the Government incorporates its response to Defendant's Motion to Suppress statement of Defendant to OS2 Mull herein.

To the extent the statement/admissions were made in the presence of various persons in the form of statements from the Defendant, where the person hearing the conversation neither initiated the conversation nor asked questions of the Defendant, no Article 31 warnings were required. *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981); *United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Richards*, 17 M.J. 1016 (N.M.C.M.R. 1984). Persons who heard statements from the Defendant, without asking questions or initiating the conversation

are no different than the informant who merely reports what is heard. An informant in such a situation has no obligation to provide the suspect with rights warnings, and none is required here. *Huffa v. United States*, 385 U.S. 293, 17 L ed 2d 374, 87 S Ct 408, reh denied 386 U.S. 940, 17 L ed 2d 880, 87 S Ct 970 (1966). Further, spontaneous statements made by Defendant, involving neither an interrogation or request for any statement, are admissible without Article 31(b) warning. *United States v. Barnes*, 19 M.J. 890 (A.C.M.R. 1985); *aff'd*, 22 M.J. 385 (C.M.A. 1985). *United States v. Willeford*, 5 M.J. 634 (A.F.C.M.R. 1978), *petition denied*, 6 M.J. 83 (C.M.R. 1979). A list of the statements/admissions which Defendant made spontaneously, were attached hereto.

To the extent Defendant's motion covers results of Defendant's interview by the Naval Investigative Service, the Defendant was given Article 31 warnings, and waived his right to remain silent. At one point in the interview when he indicated he might need to talk to an attorney, the agent stopped the interview and asked Defendant if he wanted an attorney present. Defendant stated he did not, initiated further conversation, and the interview proceeded.

To the extent Defendant's motion includes statements/admissions made while in the Naval Hospital, Charleston, South Carolina, to the extent they are not covered and listed above as spontaneous statements/admissions, the Government incorporates herein its reply to Defendant's motion to suppress evidence obtained during Defendant's stay at Naval Hospital, Charleston.

The Government desires oral argument on the motion.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

I hereby certify that a copy of this Answer was served on the defense counsel by hand delivery on 11th day of March 1989.

/s/ Terrence J. Thompson
 TERRENCE J. THOMPSON
 CAPT, USMC
 Trial Counsel

MIDSOUTH JUDICIAL CIRCUIT
 GENERAL COURT-MARTIAL

UNITED STATES

v.

ROBERT L. DAVIS, OSSA, USN

RESPONSE TO DEFENDANT'S MOTION
 TO SUPPRESS EVIDENCE

Comes now the United States in response to Defendant's motion to suppress evidence.

Article 31(b) prohibits the interrogation or request for a statement from an accused or a person *suspected* of an offense without first advising him of his rights.

On or about October 29, 1988, when Defendant was asked to provide his cue sticks, he was not a suspect, nor did the Naval Investigative Service (NIS) have any reason to suspect Defendant. Since NIS did not, and had no basis to, suspect Defendant, Article 31(b) warnings were not required prior to NIS's request for Defendant to provide his pool cues.

NIS's knowledge that the victim died from blunt head trauma, did not make Defendant a suspect. In fact NIS asked several individuals who had been playing pool in the Enlisted Men's Club the night of the victim's death to provide their pool cues. None of these individuals were provided Article 31(b) warnings because NIS did not have a suspect in the case. Further, Defendant, along with several other individuals, voluntarily provided NIS with their cue sticks.

In determining whether Defendant was a suspect at the time of the interview, the totality of the circumstances must be reviewed. *United States v. Anglin*, 40 C.M.R. 232, 235 (C.M.A. 1969); *United States v. Leifler*, 13 M.J. 337, 343 (C.M.A. 1982). Two questions must be answered, (1) did the interviewer suspect Defendant (subjective test), and (2) should the interviewer have suspected the accused (subjective case). *United States v. Ravenel*, 20 M.J. 842 (A.C.M.R. 1985), *R'vsd*, on other grounds, 26 M.J. 344, (C.M.A. 1988). At the time of the NIS request to Defendant for pool sticks, NIS did not suspect Defendant, nor did it have sufficient basis to suspect Defendant in the case, and no Article 31(b) warnings were required.

Defendant's motion to suppress the cue sticks should be denied.

The Government desires oral argument on the motion.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

I hereby certify that a copy of this Answer was served on the defense counsel by hand delivery on 11th day of March 1989.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

[115] MJ: Very well, which motion do you wish to take up at this time, counsel, please?

DC: Just a moment, sir.

MJ: Of course, sir.

[Defense counsel reviewed his documents.]

DC: It should be motion 20, the motion for appropriate relief in the form of suppressing oral statements and admissions, specifically we will be dealing with a statement made to the Naval Investigative Service on 20 October.

MJ: Was that reduced to writing?

DC: Yes, sir, it should be. Motions 20 and 21, sir. We will also be dealing with the introduction — with a motion to suppress the introduction of the pool cues.

MJ: Very well, sir. Are you ready to proceed on that one, Captain Thompson?

TC: Yes, sir, these are motions 20 and 21. Since the same investigative personnel were involved in both instances, the statement and the taking of the evidence, for reasons of expedience, the government would propose covering the 20th of October statements of the accused and the seizure of the pool cues on the 20th of October at the same time.

MJ: Any objection to that, counsel?

DC: No, sir, that's fine with the defense.

MJ: Very well, you may, of course, proceed, sir.

TC: At this time, the government would call Special Agent Keith Clark.

[116] Special Agent Keith Van Clark, Naval Investigative Service, was called as a witness for the government, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please, state your full name.

A. Keith V. Clark.

Q. How do you spell your last name, sir?

A. C-L-A-R-K.

Q. Who is your employer?

A. The Naval Investigative Service.

Q. And how long have you been employed by the Naval Investigative Service?

A. Approximately five years.

Q. What are your duties with the Naval Investigative Service?

A. I'm a criminal investigator. My duties consist of investigating crimes and presenting facts.

Q. Special Agent Clark, do you know the accused in this case?

A. Yes, I do.

Q. If he's in the courtroom today, would you point to him and state his name.

A. [Doing as directed.] Yes, it's Robert Davis. He is sitting in the center of the left table.

TC: The record should reflect that the witness has correctly identified the accused.

Q. How do you happen to know Seaman Apprentice Davis?

A. Only through this investigation. He was developed as a suspect during the investigation.

Q. Directing your attention to October of 1988, were you conducting such an investigation at that time?

A. Yes, I was.

Q. What gave rise to the death investigation, just briefly?

A. On the morning of October the 3rd, the body of Keith Shackleton was found behind the commissary on the Naval Base. He had been injured, injuries to the head which resulted in his—and he was dead. [117] Injuries

resulted in his death. The investigation initiated at the time the body was discovered and an agent was dispatched to the scene.

Q. Directing your attention to about the 20th of October 1988, did you have occasion to see the accused about that date?

A. Yes, I did.

Q. And what was that occasion?

A. That was an occasion for collecting information. We wanted to talk to Robert Davis for information he may have as we believed him to have been in the club and might have valuable information in the investigation. It was a witness interview.

Q. You've just characterized the 20th of October interview with Seaman Davis as a witness interview. Earlier you testified that he, Seaman Davis, was developed as a suspect. When—was he a suspect on the 20th of October?

A. No, he was not. He was not developed as a suspect until later in the investigation. On the 20th of October, we had no reason to suspect him of any wrong doing.

Q. Where did you see Seaman Apprentice Davis on the 20th of October?

A. Went to the USS Mahan and saw him on board the ship in the Admiral's stateroom.

Q. Now, you testified earlier that at that time Seaman Apprentice Davis wasn't a suspect in this homicide investigation. Was NIS investigating him for anything else?

A. No, we were not.

Q. When you talked to him in the Admiral's stateroom, was anyone else present?

A. Yes, Special Agent Sentell and myself and, of course, Bob Davis.

Q. Prior to speaking with the accused, Seaman Apprentice Davis, did you give any sort of rights warnings?

A. No, we did not.

Q. And why not?

A. We had no reason to suspect him of any crimes at the time. There was nothing to warn him for.

Q. You've characterized Seaman Apprentice Davis as a witness at that time. What, if anything, within your investigation led you to Seaman Apprentice Davis as a witness?

A. Special Agent Sentell had talked to other people at the — which were patrons at the EM Club and had identified several people who owned personal pool cues. Robert Davis was one of those persons.

[118] Q. Did you talk to any of the other individuals that were identified?

A. Yes, we have. I have.

Q. Did NIS talk to any of those individuals before they talked to Seaman Apprentice Davis?

A. Yes.

Q. Now, when you talked to Seaman Apprentice Davis, what did the interview consist of? In other words, what was the direction of your questions?

A. It was the same set of standard questions we asked of all the witnesses that we were contacting: if he was at the club, meaning the EM Club on the night of 2 October; if he knew the victim; if he knew when — what time the victim left the club or if he saw him there. General inquiry-type questions.

Q. Now you mentioned earlier that you had obtained information that the accused was a club patron who owned — who played pool using his own pool cues. What was the significance of the pool cues?

A. At that time, we had reason to believe that the victim was possibly killed with an instrument which could have been a pool cue. The only cues that can come in and out of the club are personally owned pool cues.

Q. Did you have any reason to believe Seaman Apprentice Davis' pool cues were involved specifically?

A. No, we did not.

Q. Did Seaman Apprentice Davis speak to you voluntarily?

A. Yes, he did.

Q. Just to clarify that, did the CO or anyone in a supervisory position in his chain of command have to order him to talk to you?

A. No. I know of no such order.

Q. When you were speaking with him, was he restrained in any way by NIS?

A. No, he was not. He was — came into the room. He was told that — why we were there and what we were inquiring about and that he could leave any time he wanted to.

Q. At any time during this interview, did Seaman Apprentice Davis ask to terminate the interview?

A. No, he did not.

Q. About how long did this interview aboard the Mahan take?

A. Approximately 30 minutes.

[119] Q. Did the subject of cue sticks come up during that interview?

A. Yes, it did.

Q. Did the accused indicate whether or not he, in fact, owned any pool cue sticks?

A. Yes, in fact, he said he owned two sticks.

Q. Did he indicate where those sticks, those cue sticks, were?

A. Yes, he said he didn't have possession of them right then that they were at his girlfriend's house that she lived in MENRIV Housing.

Q. What happened after that?

A. After talking with Davis, we took Davis with us, again voluntarily, over to collect the pool sticks which he said were at his girlfriend's house.

Q. Did he volunteer to take you over there to get them?

A. Yes. He said that he had some problem as he was on restriction, couldn't get off the ship. I told him that that would not be a problem, that we could work that with the CO.

Q. Was he on restriction for anything related to this investigation?

A. No, that was totally unrelated to this investigation. I believe he had been UA.

Q. Did you, in fact, then go from the Mahan to MENRIV?

A. Yes, we did.

Q. And how did you get there?

A. We went by government vehicle.

Q. NIS vehicle?

A. Yes.

Q. And who all went to MENRIV?

A. It was Special Agent Sentell, myself and Robert Davis.

Q. Either when you were leaving the ship or on your way to MENRIV, was the accused restrained in any way?

A. No, he was not.

Q. Did he ask to return to the ship? On the way to MENRIV did he change his mind about going there?

A. Oh, no, he never asked to return to the ship or that he didn't want to go on with any more conversation. He didn't terminate in any fashion.

Q. Did any sort of interview occur on the way to MENRIV in the car?

A. It was mostly generally conversation, not case related.

[120] Q. What happened when you got to MENRIV?

A. When we got to MENRIV Housing, close to Albertha Heffner's residence, Davis showed us where the location of her particular residence was. We pulled up, stopped, Davis got out of the car and went directly to Heffner's vehicle, a red Fierro, opened the door and proceeded to get his pool sticks out of the, I believe it was the, back floorboard of the car.

Q. Did Davis proceed to this car by himself?

A. Yes.

Q. What happened after he got the pool sticks then?

A. After he got the cue sticks, he then handed them over to me. There were two cue sticks in one case.

Q. Did you tell him why you wanted the pool sticks?

A. Yes, I did.

Q. And what reason did you give him?

A. I told Davis that I wanted the pool sticks so that we could analyze them. I don't believe I used the word "analyze," but so we could further examine them.

Q. Did he have any reaction to that?

A. The only reaction he had was some concern on his pool case, and he, in fact, pulled out one of the pool sticks because he was evidently proud of the stick. It was a high value stick evidently. There was nothing on the stick that he pointed out, but he did point out a spot on the pool case.

Q. Was there anything to this point that Seaman Apprentice Davis had said or done that led you to look at him in a different light than when you'd first interviewed him that day as a witness?

A. No, to this point, I had no reason to look at him in any different light than we did when we began.

Q. When he handed you the pool cues, or turned the pool cues over to you, did you consider him a suspect at that time?

A. No, I did not.

Q. Did you, in fact, take those—the pool cues—

A. Yes.

Q. —to have them examined?

A. The pool cues were taken back to the NIS office and, in fact, the pool cues and the case were examined.

[121] Q. Did the accused consent to your taking the pool cues? Did he give you permission to?

A. Yes, he did.

TC: The government has no further questions.

MJ: Gentlemen, cross, please.

CC: Your Honor, before we question him, could I just ask one preliminary question.

MJ: Surely.

CC: Did you take notes of this interview on the 20th?

WITNESS: Yes, I did.

CC: May we have them, Your Honor? I hate to do this. It's going to take us a long time to go through this but we intend to do this with every witness. We've been saying this for months.

TC: The government has no objection, Your Honor.

MJ: Do you have your notes with you, Agent?

WITNESS: Your Honor, I'm afraid that they are back at the office.

MJ: Your office is right here in the same building.

WITNESS: Yes, it is.

MJ: Could I trouble you to, please, go and obtain those notes.

WITNESS: Yes, sir.

MJ: Would five minutes suffice?

WITNESS: Yes, Your Honor.

MJ: Five minutes, gentlemen.

CC: Thank you.

MJ: Thank you very much.

An Article 39(a) session was recessed at 1035, 15 March 1989.

An Article 39(a) session was called to order at 1100, 15 March 1989.

[122] MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. The members are absent. Special Agent Clark remains on the witness stand and under oath.

CROSS-EXAMINATION

Questions by the defense:

Q. Agent Clark, if you would, please, tell us everything that you were aware of regarding OSSA Davis at the time you began the, what you described as an, interview on the 20th of October.

A. Everything that—I'll give it my best shot here. I knew that he was a regular patron of the club, EM Club. I knew or had reason to believe that he had his own pool cues. Just prior to talking with him, I had found out that he was UA the previous day, I believe, and that he was currently on restriction for that UA. I also knew that he had made a statement to the master-at-arms that was with him that he thought he knew who did the murder. So, I was looking at him as a witness.

A. Anything else?

A. Let's see. I also knew that—this came up just before talking with him on the 20th of October—his division officer and the Executive Officer of the Mahan told us that he had made a statement regarding wanting to shoot somebody and that they were going to have him sent over to the hospital for an evaluation due to that statement.

Q. Anything else you can think of?

A. Nothing that comes to mind at this time.

Q. Who was the case control agent on this particular investigation?

A. Special Agent Sentell.

Q. And what is your relationship to Special Agent Sentell?

A. She's a co-worker.

Q. I take it you were assisting in this investigation.

A. Yes.

Q. How closely were you and she exchanging information?

A. We tried to keep up on a daily basis.

Q. So information that she knew you would have known?

A. In all probability, yes.

[123] Q. And as of the 20th of October of 1988, NIS had already begun to narrow the investigation to believe that Seaman Shackleton was killed with a pool stick, had you not?

A. Yes, we had.

Q. You had already talked with Dr. Conradi, one of the medical examiners for Charleston County regarding the pool stick?

A. Yes, she was talked to by an agent.

Q. NIS had talked with her on approximately the 17th of October, had they not?

A. I believe that would be correct.

Q. And you were aware of that on the 20th of October?

A. Yes.

Q. And you were aware of the information that NIS was looking for pool sticks?

A. Yes.

Q. NIS had also spoken with Ms. Judy Flynn who was the forensic chemist for the Charleston City Police Department regarding pool cues, had you not?

A. Prior to the 20th, I don't know if we'd talked to her regarding pool sticks or not.

Q. NIS had also gone out to a local pool hall called "Tuckers" several days before that, correct?

A. I know that that trip was made. I don't know the exact date.

Q. And prior to talking to Seaman Davis on the 20th of October, you and Special Agent Sentell had also talked to an OS3 Guidry?

A. Yes.

Q. Petty Officer Guidry had told you that in a conversation with Seaman Davis regarding the incident over at the—over behind the commissary, Seaman Davis had indicated to him, him being Guidry, that Davis had heard something about the death, correct?

A. That's correct.

Q. Guidry had made the comment something regarding the guy falling over by the commissary?

A. I don't recall him using the term "falling."

Q. But what was the substance of the information that Guidry provided you as to what Seaman Davis had said?

A. I talked to Guidry and I also—

[124] Q. Didn't Seaman—Didn't Petty Officer Guidry tell you that Seaman Davis said that the guy was killed with a pool stick?

A. Yes. Okay, that was Guidry and not Smith. Smith was a master-at-arms that was sitting with Davis also.

Q. But prior to talking to Seaman Davis, you had talked to Petty Officer Guidry who had told you that Davis had said to him that the individual was killed with a pool stick.

A. I'm sorry my mem—I'm trying to recall the conversation without refreshing my memory by notes, and I believe he did relate to the—that the guy had been killed by a pool stick.

Q. Okay, you as an agent of the Naval Investigative Service were aware of that prior to talking to Seaman Davis, correct?

A. That's correct.

Q. You were also aware of information from Petty Officer Smith that Seaman Davis might have some information for you, correct?

A. That's correct.

Q. All this time NIS is looking a pool stick as the probable murder weapon, correct?

A. That's correct.

Q. Do you remember OS3 Guidry telling you that Seaman Davis had told him that Davis had been hit and jabbed with a pool stick?

A. Excuse me, that the victim, Shackleton, had been hit and jabbed and with a pool stick?

Q. Right.

A. That that was the information that he had heard. In other words, Guidry saying that Davis told him that he had—that Davis had heard that from a fourth source.

Q. Guidry told you, "Davis told me the guy was hit and jabbed with a pool stick," correct?

A. He said that—yes, he said that.

Q. So you're aware of Seaman Davis having what one of your agents has described as intimate information regarding the manner of death, correct?

A. That would be correct.

Q. Now, at the time, on the 20th of October, that you were investigating Seaman Davis, had the Naval Investigative Service promulgated any information regarding the manner of death or were y'all holding that close to your vest?

A. Had we released any of that information to anybody or had we just the knowledge?

[125] Q. Special Agent Clark, at the—on the 20th of October, NIS was keeping the information that y'all knew or that you believed regarding the manner of death to yourself, weren't you?

A. Yes.

Q. It was not public information.

A. No, it was not.

Q. So someone knew, then that individual had some type of inside information.

A. Yes.

Q. And you were aware that Seaman Davis had that type of inside information.

A. At the time it was general information. We had already collected a couple of pool sticks.

Q. But was it general information or was it inside information? You just told us that y'all were holding that, that you were not disclosing that.

A. Some of it was kept and not released, the specific injuries.

Q. You also knew prior to talking to Seaman Davis that he owned at least one pool stick that could be broken down, that could be unscrewed, correct?

A. That's correct.

Q. You also knew or your believed that the victim, Seaman Shackleton, had been at the Enlisted Club on the evening of the 2nd of October, morning of the 3rd of October, correct?

A. That's correct.

Q. You also had information that Seaman Davis was at the Enlisted Club that night, correct?

A. Yes, that's correct.

Q. You were also aware that on the morning of the 3rd of October, Seaman Davis had been an unauthorized absentee for a portion of the morning.

A. That's correct.

Q. And you were aware that on the 20th of October, he had been an unauthorized absentee.

A. That's correct.

[126] Q. And you were aware, from Petty Officer Smith, that Seaman Davis had made a statement to him, meaning Petty Officer Smith, that Davis knew who committed the murder.

A. That's correct.

Q. You also know the Executive Officer, the Division Officer, the Chief Master-at-arms and other individuals on the Mahan were aware of a statement that Davis had made to the Division Officer regarding wanting to kill someone.

A. That's right.

Q. And that was, in fact, the reason that y'all were over on the Mahan that day, isn't it?

A. No, it is not.

Q. How many people had told you that Seaman Davis owned some breakdown pool sticks?

A. That would be hard for me to say. It would be several people.

Q. Do you have any notes that would refresh your memory?

A. There would be various interviews of people that were patrons at the club.

Q. Four? Five? Ten?

A. I'd say four or five.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel reviewed his notes.]

Q. Special Agent Clark, what information did you know on the 20th of October regarding Seaman Davis allegedly slushing funds on the Mahan?

A. I didn't have any knowledge of that until after we started talking with Davis.

Q. How did you get that knowledge?

A. It was volunteered by Davis.

Q. Did you warn him at that point of illegal — of his Article 31 rights about not discussing matters involving illegal loan operations?

A. I did not. He volunteered the information, and I didn't ask follow up questions on the slushing.

Q. So in one fell swoop Seaman Davis would have blurted out that he gets his money from playing pool, that he makes about \$900.00 a payday from slushing, collecting from the ussery loans, that he owes OS2 Mull [127] money from slushing because people who do not want to borrow from Mull will borrow from him and he gets the money from Mull. That's all —

A. I asked him if he owed anybody money or if anybody owed him money.

Q. So, then you were asking him questions concerning that without having warned him?

A. I was asking him questions —

Q. Yes or no?

A. I was asking him questions whether or not he owed anybody money.

DC: Just a moment, sir.

MJ: Certainly.

[Defense counsel reviewed his notes.]

Q. Now during the interview, as you have classified this, on the 20th of October, Seaman Davis provided you and Special Agent Sentell specific facts concerning the alleged murder that occurred on the 3rd of October, didn't he?

A. I believe the facts that he provided us on the 20th were quite vague as far as what happened or how the victim actually was killed.

MJ: I didn't hear that. I'm sorry, Agent.

WITNESS: I said I believe the information that Davis provided to us on the 20th was vague information regarding how the victim was killed.

MJ: Thank you. Please, proceed, sir.

DC: Thank you, sir.

Q. Would you regard a description of the victim as having been "hit and jabbed" as vague information?

A. When it is being reported that this was information from a third source.

Q. When it's an individual who has, according to your own testimony, made statements to at least two different people knowing about the method of death and then tells you that he was hit and that he was jabbed, that's still vague information or is it intimate knowledge?

A. I am not sure at the time on the 20th if I knew that the victim was specifically jabbed or all the specifics of the autopsy and the medical results. It would be pertinent knowledge, this knowledge that would only be known by the perpetrator.

[128] Q. The case control agent in this case was Special Agent Sentell?

A. That's correct.

Q. And Agent Sentell is the individual in charge of the entire investigation. She was in the room with you on the day that you were interrogating Seaman Davis on the 20th of October?

A. Yes, she was.

Q. And at no time on the 20th of October did you provide Seaman Davis any advisement of his Article 31 rights, did you?

A. We did not.

Q. And after this approximately 30 to 40 minute interrogation, where he had provided you information about the individual, the victim, having been hit and having been

jabbed, indicating jab and hit in the left temporal area of the head, you then asked for Seaman Davis' pool cue.

A. We asked for his pool cue.

Q. Did you ever use—at that point, did you use a permissive authorization for search and seizure form?

A. No, it was—I believe this was purely voluntary allowing us to look at his pool cues. It was not a search.

Q. So you never—

A. It was not a seizure.

Q. You never told him that he was suspected of having in his possession what NIS believed to be a possible murder weapon?

A. No, we did not.

Q. Now, you'd said earlier that he was free to go, free to come. He just kind of volunteered to go up there. Isn't it true that he had been directed by the master-at-arms to be outside the Commodore's stateroom?

A. He was on restriction, and he was probably directed there.

Q. FC2 Smith was the duty master-at-arms that day, wasn't he?

A. Yes.

Q. And FC2 Smith is the one who opened the door and said, here's Davis, he has something to tell you.

A. He opened the door for Davis to come in. I don't recall what he said at the time.

Q. But Smith, the master-at-arms, is standing there with Davis?

A. Yes.

[129] Q. So, Davis wasn't just volunteering to come in? He'd been directed by the law enforcement personnel of that command to be there to talk to you.

A. He was directed to be there. He was not—mandatory to stay. The master-at-arms was not in the room with us.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel reviewed his documents.]

Q. Agent Clark, what is your position in this investigation in term of the hierarchy of Agents that are working on it, where do you fit in?

A. I am a supporting agent in the investigation and have done, probably, the second most amount of work in the investigation, other than the case agent.

Q. So, if there were any agents around who would know more the case than any of the others, it would be you and Special Agent Sentell.

A. That's correct.

Q. Now I assume that the various agents working on this case had been sharing information.

A. Yes.

Q. And that y'all were aware of what each other were doing?

A. Yes.

Q. What information did you have regarding an interview with Seaman Davis at the Enlisted Club on the 14th of October?

A. I was unaware that he had — his name had come up before or that he was interviewed prior to that.

Q. Did you ever discuss this case with Agent C. R. Baldwin?

A. Yes. In fact, I went to the Club with Special Agent Baldwin several times.

Q. Did you go on the 14th of October?

A. I really don't recall if I was there on the 14th of October or not.

Q. Do you have notes of that trip to the Club?

A. I'm not sure if I was taking notes on the 14th, if I was there, or if Baldwin was there on the 14th, if he was the one that was taking the notes.

[130] DC: We'd like to see those notes if we could, sir.

MJ: Whose notes?

DC: The notes of the trip to the Club on the 14th of October, sir.

MJ: I thought he went and got his notes.

DC: Sir, those were notes of simply an interview which occurred on the 20th of October. What we're looking at, sir, is the information that the government had as of the 14th of October when they interviewed Seaman Davis.

MJ: I thought he said he didn't interview Seaman Davis on the 14th. How would he have notes of an interview he didn't participate in.

DC: Special Agent Baldwin has information in here. Special Agent Clark has indicated that he and Baldwin were both at the Club on the 14th of October, that he doesn't remember for sure whether or not Baldwin were making the notes. Sir, the situation is that the government is in control of the information which the government knew as of the 20th. What we're trying to do, and what we've been trying to do all along, is discover what information the government had at the time. We believe that this is relevant and discoverable.

MJ: How about the notes of the 14th, Captain Thompson?

TC: The government's not sure the witness said that he was even in the Club on the 14th of —

MJ: Answer my question. What about the notes of the 14th, if they were taken by Mr. Clark, by Mr. Baldwin, by any of the other agents, by anyone, concerning the visit to the EM Club, are there any notes in existence, please?

TC: I don't know, Your Honor.

MJ: Can we find out?

TC: We can — I'd be willing to have the witness check.

MJ: Do you need those notes to conduct your examination?

DC: Yes, sir, I'd like to see them.

MJ: Before you proceed any further?

DC: Yes, sir.

MJ: Very well, let's do that. We will recess until recalled by the military judge. Thank you.

The Article 39(a) session recessed at 1127, 15 March 1989.

The Article 39(a) session was called to order at 1204, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. The members are absent. Special Agent Clark remains on the witness stand.

MJ: Are you ready to proceed?

DC: Yes, sir.

MJ: Surely, at your pleasure.

CROSS-EXAMINATION (continued)

Q. Agent Clark, before the recess, we were discussing notes of interviews that were done on the 14th of October at the Enlisted Club. Were you able to track down those notes?

A. No, sir. I looked through all the notes that I have, and I have no notes of interviews of Davis on the 14th.

Q. Do you have any notes of interviews with Davis on any other date?

A. Not any other date prior to the 20th. I did not look for any dates of interviews with Davis after the 20th.

Q. How about describe the room, describe the stateroom, where you were located.

A. The stateroom that we were located was large in comparison to other staterooms, had a round table as you entered the room just to the left of the door with an "L"-shaped couch and some moveable chairs on the other side of the table.

Q. All right, as you entered the—you go through the door, the round table is to your left. What's to your right?

A. To your right is another doorway, you go in, and there's a bathroom.

Q. Small—there's a rack and then around into a head?

A. Yes.

Q. Was there also a desk in that outer room?

A. Yes, there is a desk there.

[132] Q. And there was a duty master-at-arms stationed outside the door to that compartment?

A. I believe he did stay outside the door.

Q. And two NIS agents in the compartment at the time you interrogated Seaman Davis.

A. We were interviewing him, and, yes, there were two agents in the room.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel conferred.]

Q. Agent Clark, at any time during this investigation, after the 14th of October, did NIS generate a document showing the results of the interview with Seaman Davis at the Enlisted Club that night?

A. Yes, there was a note on a listing of interviews conducted. It was broke down by each individual agent, and that was reflected that Special Agent Baldwin on the 14th had Davis' name down, had talked to him.

Q. Was there anything any more detailed than that?

A. If there is anything more detailed then Special Agent Baldwin would have any notes on it. I'm not aware

of any results of interviews that were conducted or that were written on any interviews on the 14th.

Q. In a document that — I can't find the date on it, but in a document indicating interviews that you had conducted, it indicates that on the 4th of October, you had spoken with a Michelle Renee Lippert, and that she had overheard some rumors. You also had spoken with a Debby K. Clark, both of these individuals from the enlisted galley indicating they had overheard rumors. What rumors had they overheard?

A. They had overheard rumors about the victim being found behind the commissary, and the specific rumor that came back from that — I believe I conducted a couple interviews on that. One was a dental technician that originally reported that he thought he had some information regarding this. As I traced it back, it was just coming from information that was overheard from a police — base police radio.

Q. What was the substance of that rumor?

A. I would have to refresh my memory from notes on the exact substance of the rumor. I do recall that after talking with several people that it was determined that this was not any pertinent information that was derived from anything — knowledge of the actual scene.

[133] Q. So you would have spoken with Lippert, Clark and also Daniel Arthur LaSalle from the dental clinic.

A. Right. LaSaile, I believe I spoke with first.

Q. Are there reports? Are there any type of formulation of the information from those interviews?

A. It was considered a negative interview in that the information derived from that did not assist in any way of narrowing down any suspects. I believe that I made a results of interview on that information. I would really

have to go back and research the file to see if, in fact, I did make that.

Q. But, at this point, you can't recall the substance of the rumor, but with the assistance of your files, you could.

A. Yes, I would be able to. The substance of the rumor was first given me was that someone had heard early on that someone was killed behind the commissary. I think the substance of the rumor was only that someone had died, and that was, maybe, before a lot of rumor had gotten out. So, I was interested in knowing who knew that early. I traced it back. It was overheard from a police broadcast on the radio.

Q. But the fact that someone had died behind the commissary was generally common knowledge. It had been published in the newspaper.

A. The newspaper hadn't had it out at that time. That was — I don't believe. That was the 3rd.

Q. So, as of Tuesday the 4th of October, it's your opinion or your testimony that general information about the death behind the commissary was not known around the base?

A. Oh, it was known at that time, but it wasn't known at the time that the information was reported to have been transpired that was — the information was reported to me on the 4th but came to LaSalle on the 3rd.

Q. What's the information? That's what we're driving at.

A. To the best of my knowledge, the information was only that someone had been killed behind the commissary.

DC: We don't have anything further at this time, sir.

MJ: Captain.

[134] **REDIRECT EXAMINATION**

Questions by the prosecution:

Q. Just for the record, Special Agent Clark, there was reference made to notes of an interview of the accused on the 20th of October 1988, did you provide those — had you provided those notes to the defense?

A. The notes on the interview of the 20th of October had been provided today to the defense.

Q. Some reference was made to statements the accused made to a Petty Officer Guidry, an OS3 Guidry, do you remember exactly when you found out what information Guidry had concerning the accused?

A. Guidry was fully interviewed after we had talked to Davis, and we did talk to Guidry prior to Davis on the 20th, and, at that time, he told myself and Special Agent Sentell about Davis relating that someone had told him that the victim was beaten and jabbed with a pool stick. The information, however, when Guidry was describing being jabbed was not in the correct area of body that the victim was, in fact, injured.

Q. What was your impression of what — of the information? Was it that it was a rumor or —?

A. My impression of the information was that it was common knowledge at this point that we were interested in pool sticks and that a rumor mill had already started that we were looking at the victim being injured by a pool stick and that this was just another spinoff of people's imagination of the injuries that the victim may have sustained.

Q. Had you heard various rumors during the course of the investigation?

A. Yes, we had.

Q. Did you — now you talked about being aware that the XO and, apparently, the Division Officer had knowledge that Davis had made a statement at some point that he had wanted to shoot someone.

A. Yes.

Q. Did you or Special Agent Sentell attach any significance to that statement in conjunction with your interview of the accused?

A. The only substance that I —

DC: Sir, object to the comment as to any importance that Special Agent Sentell would have attached to that. I don't believe that he's competent to testify regarding that.

MJ: He already indicated that they were exchanging information. So I will allow it. You may proceed, sir.

[135] WITNESS: The only substance that I put to that information was that possibly the individual we were to interview, Davis, was prone to making statements of that nature. I had no information that he, in fact, intended to carry any of that out, and that we were not looking at a victim of a shooting. I did not consider that that was necessarily pertinent to this investigation.

Q. There's also evidence that the accused had been on some sort of a short UA period and, as a result, was being placed on restriction. Did you question him about this unauthorized absence?

A. Yes, we did, and he, to the best of my memory, stated that he had overslept at a girlfriend's house.

Q. What, if any, threats did you make to the accused?

A. Never threatened the accused.

Q. Are you aware the master-at-arms aboard the Mahan making any sort of threats to him?

A. I'm not aware of any threats having been made to any member of the Navy.

Q. Was there any sort of subtle actions that could have been construed as threatening by the accused? Showing handcuffs, that sort of thing.

A. No. My weapon and my handcuffs remained covered underneath my jacket. I kept a cordial atmosphere. It wasn't ever an adversarial-type situation during the interview, and I made it a point that he knew who I was, and so

did Special Agent Sentell. We both showed our credentials when we introduced ourselves and were very open about what we had to talk with him about.

Q. With regard to the pool cue sticks, you said that the accused surrendered them to you. Did you say anything about a search warrant? Did you threaten to get a search warrant if he didn't turn them over? Anything like that?

A. No, I did not. At the time, we did not have enough probable cause to obtain a search warrant for any pool sticks.

Q. Did you mention anything about a search warrant to Seaman Apprentice Davis?

A. To the best of my memory, I did not ever say anything to him about getting a search warrant.

TC: The government has no further questions.

MJ: Counselor.

DC: No, thank you, sir.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Prior to, and including, the 20 October interview, how many witnesses had you and your colleagues interviewed or approached? I don't need a precise number, but could you give me a fairly good ballpark figure, sir.

A. The best ballpark figure that I can give is that I know initially we had approximately six agents, six to eight agents, working on this at a time, and, in the period of time between the 3rd and the 20th of October, collectively, NIS agents out of this office had talked to maybe a hundred to two hundred and fifty people.

Q. You indicated that there had been some individuals that had been playing pool at the EM Club were frequent participants at the EM Club and owned their own pool cues. How many of such individuals were you aware of at the time?

A. I was aware of approximately four individuals we knew had their own pool cues.

Q. I believe you indicated that y'all drove out to MENRIV to the quarters and Seaman Davis got out and went to a red Fierro.

A. Yes.

Q. How did he get in? Was it unlocked?

A. It was an unlocked vehicle.

Q. What time of day was this, please, Agent?

A. This was in bright sunlight. I don't recall when we did the interview.

Q. Was it morning? Afternoon?

A. It was either just before lunch or during the noon hour.

Q. Whose car was that? Did you ever determine that?

A. That was the government vehicle that —

Q. No, no, I mean the car that he went into.

A. Oh, yes, sir.

Q. I'm sorry.

A. The car that he went into, in fact, belonged to Albertha Heffner who he had been seeing socially.

[137] Q. So there was an unlocked car that contained what I believe you described as valuable cue sticks.

A. Yes.

Q. Did you go into the quarters at all, or did you leave?

A. When you got to the residence, Special Agent Sentell was first going toward the front door to get the owner of the car and have her go in the car. Davis went to the car and opened the car door as I was saying, "Maybe we should wait and get the owner of the car out here to get into her car," and he went ahead and opened the car door and got his sticks out.

Q. You had indicated that you were aware that the accused may have had some information regarding the

nature of circumstances of the death of Shackleton and, again, bear with me. [Reviewing his notes.] That he had heard from some other person about those circumstances. is that fairly accurate?

A. Yes, that sounds fairly accurate. If I could, maybe, clarify?

Q. Let me just ask: it was my understanding from your testimony that you were under the impression that whatever information he had, he had obtained some third source, some other source.

A. That's correct.

Q. Did he ever tell you that source during the 20 October interview?

A. I believe he—yes, he told us that he had heard about the victim being killed and this was from, I believe, a Bonnie Krusen and a Kaiser.

Q. Oh, I'm sorry. Bonnie?

A. Bonnie Krusen.

Q. And other individual?

A. Last name Kaiser.

Q. At that time, were these people known to you? Did you have knowledge of their existence and their possible contact with this case?

A. They both had been interviewed.

Q. So, they were not strangers to you or to Agent Sentell?

A. No, they were not.

Q. Let me ask you this: at the time of the interview, did he give you information that tracked with what your investigation had revealed or was it off the mark?

A. The information that he gave was not specific about the way the victim died. In fact, he was very certain that he had only heard about it through conversations with other people.

[138] Q. In other words, during the 20 October interview, he told you that his information had been derived by identified individuals?

A. Yes.

Q. You indicated you had already collected some cue sticks.

A. Yes, sir.

Q. From whom did you collect them?

A. A pool stick was collected from Kaiser by Special Agent Sentell. I was not present during that collection.

Q. You used the plural.

A. I believe—I don't know of another pool stick that was collected prior to that date. There were other pool sticks collected during the investigation.

Q. It would seem to me from your testimony that the pool cue had become the most likely means of infliction of the mortal wound.

A. Yes.

Q. Why? The pool cue is not that unusual in shape. Why a pool cue as opposed to, let's say, a baseball bat or a fungo bat or a softball bat?

A. A pool cue, due to its circumference, as a baseball bat or a softball bat, would be large.

Q. In other words, you had specific evidence which indicated that an instrument such as a pool cue was the most likely cause of the injury?

A. Yes, this, again, was derived through agents interviews of medical personnel and information which was just brought back to me. So I had a general knowledge of it.

Q. So pool cues were of particular interest to you as opposed to some other blunt instrument?

A. That's correct.

MJ: I have no other questions, Agent. Thank you very much. Any questions based upon the inquiry of the military judge, please?

DC: Yes, sir.

MJ: Please.

DC: Just a moment, sir,
[Defense counsel conferred.]

MJ: Let me ask you one more question.

[139] EXAMINATION BY THE COURT (continued)

Q. Kaiser, is Kaiser a member of the naval service? Is he uniformed?

A. Yes, he is, sir. I believe his first name is Jeff.

MJ: Very well, thank you, sir.

RECROSS-EXAMINATION

Questions by the defense:

Q. Agent Clark, your notes indicate that you were interested in the clothing that Seaman Davis was wearing on the night of the 3rd of October. What was your curiosity regarding that?

A. Very often while conducting witness interviews, people will remember what certain individuals were wearing and be able to describe that but not know their name. We tried to identify everyone that was at the club by what they were wearing so that we could also identify them through other interviews.

Q. According to this you've got Davis wearing jeans with six pockets and a light blue shirt. Back off of that. The issue we're looking at is whether or not Seaman Davis was suspect, should have been a suspect, on the 20th. Are you aware of the concerns that the command had that Seaman Davis was a possible suspect in this homicide?

A. Yes, we tried to alleviate the command's concerns at that point.

Q. So you are aware that the command thought he was a suspect?

A. I cannot control what command thinks.

Q. So, someone else had told you that this guy is a suspect?

A. They don't make that determination.

Q. But someone had told you this man is a suspect, we want you to talk to him?

A. No, I don't believe that ever came out like that.

DC: No further questions at this point, sir.

MJ: Captain.

TC: Yes, sir.

[140] REDIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Sentell [sic], you testified that when you interviewed Davis on the 20th of October, he told you that he had learned information concerning this death from other individuals, correct?

A. Yes.

Q. He mentioned Bonnie Krusen specifically for example or a Krusen?

A. That's correct.

Q. As a result of what Seaman Davis told you, did it cause you to more closely scrutinize the activities of the persons he told you about?

A. That was a thought that needed verification before I could do—before I could really consider him suspect.

Q. Did you look into what he had told you?

A. Yes. In fact, Special Agent Sentell and myself went over to the—I believe it was a Howard Johnson's and tried to track down exactly what Bonnie Krusen's activities were

and who she was with and what room was rented and spent a good day investigating that lead.

Q. Did you collect a pool cue from Bonnie Krusen?

A. I believe there was a pool cue collected from Bonnie Krusen.

MJ: I didn't hear what — What did you collect from her? I apologize, sir.

WITNESS: I believe I did — I believe there was a pool cue collected from Bonnie Krusen.

MJ: Thank you.

Q. When you went aboard the Mahan on the 20th to talk to Seaman Davis, did you advise the command of why you were there?

A. Yes, I did.

Q. What did you advise them in that regard?

A. They had the prior knowledge that we wanted to talk with Davis because contact had been made on the previous day that Davis was UA and that we wanted to talk with him. So command knew that we were wanting to interview Davis and that, by the way, was prior to any statements Davis made of wanting to shoot anybody or anything of that sort.

[141] Q. What did you tell — Did you tell the command why you wanted to interview him? Did you say — did you tell them he was a suspect in a murder case? What did you tell them?

A. No, we — command was told that Davis was going to be interviewed as a witness and, in fact, was very deliberately told that he was not suspect in the investigation but we just needed to talk to him as a possible witness.

TC: The government has no further questions.

MJ: Anything further, Mr. Yandle?

CROSS-EXAMINATION

Questions by the defense:

Q. The absence you're discussing was an absence on the 3rd of October, correct?

A. No, I was discussing the UA the day prior to being — Davis being interviewed on the 20th.

Q. Are you sure that the absence was not the 20th?

A. The morning of the 20th?

Q. Uh-huh.

A. I believe he was absent prior to that on the 19th and came in on the 20th. But he was absent that morning also.

DC: Just a moment, sir.

MJ: Sure.

[Defense counsel conferred.]

Q. Agent Clark, on the 20th you'd indicated that you've talked to Petty Officer Guidry. Do you have any notes of that conversation?

A. Yes, I did make notes of Guidry's conversation.

DC: Sir, we'd like to see those notes also. This indicates — this is an investigative action report indicating that OS3 David Lloyd Guidry, USN, 437-17-3736, advised that prior to 6 October of '88, subject told him that victim was killed when he was hit and jabbed with a pool stick. Sir, the issue is the extent of knowledge that the Naval Investigative Service had at the time that they first spoke with Seaman Davis. I believe that it's relevant to the inquiry.

MJ: Do you have those notes, Special Agent?

WITNESS: I believe I do, Your Honor.

[142] MJ: Let me leave it at this: the agent, I am sure, will make the notes available to you. If you feel as though they warrant further examination of the agent, you, certainly, will be free to call him and to cross-examine him in that regard. Fair enough?

DC: Yes, sir.

MJ: Do you have the notes here?

WITNESS: Yes, sir.

MJ: Oh, I'm sorry. I apologize. Why don't you display them to counsel, Special Agent.

[The witness did as directed.]

WITNESS: These are the actual notes taken from the interview of Guidry.

Q. Agent Clark, when were these notes made?

A. These notes were made on 20 October just prior to—during the time I was talking with Guidry.

Q. What are the notes that you're now referring to? I mean, what do you have in your hand that you keep looking at?

A. I made a copy prior to coming over of my original.

Q. So, I have the original, you have the copy?

A. Yes.

Q. Now, these notes were made when?

A. On the 20th of October.

Q. During the time that you spoke with Guidry?

A. Either during the time that I spoke him or shortly thereafter, one. I believe this was made actually during the time I was speaking with him.

Q. Any changes to this? Did you go back and change this at any time between the 20th of October and today?

A. Not to my knowledge.

DC: Let me show you the original so you can take a look at that and see if there have been any changes, any modifications.

Q. Based on your review of that, do you notice any changes?

A. There is a change here that was made during the interview where I changed a "was have" to a "could have," and that's the way that I [143] understood it the first time. It was clarified that he said that "could have" instead of

"was," and also a spelling, I think, on Louisiana. There was some cross over there.

Q. But other than that?

A. Excuse me, I gave you my copy too.

Q. Other than that, the document that we have today is the document that was drafted with some minor corrections on 20 October?

A. That's correct.

Q. And I believe in your notes it indicates that Davis said the victim was beat—was beat up and jabbed with something that could have been a pool stick. Is that accurate?

A. That's correct.

Q. So, it doesn't say anything in here about Davis telling Guidry that somebody else told him that. This is simply Davis telling Guidry that the guy could have been killed and beat up or beat up and jabbed with a pool stick. So, you were aware that Davis had made, at least, an admission to Guidry that he knew how the man had been killed, that he'd been beaten up and jabbed with something that could have been a pool stick and you knew that prior to talking to Davis, didn't you?

A. Yes, I knew the information that's contained in my notes, and that he stated that he'd been beaten and jabbed with a pool stick.

Q. And yet with that information, with the knowledge that he was absent from his command the morning of the alleged murder, with the knowledge that Seaman Davis had been in the Club on the night of the alleged murder, with the knowledge that he had pool sticks, and the knowledge that he had made this statement to Davis [sic], you didn't suspect him of any misconduct?

A. At that point, I could not determine what weight to put on the statement that he had made to Guidry.

Q. You'd indicated some problem or indicated that Guidry couldn't tell you exactly where the guy had been hit.

A. That's correct.

Q. But when you were talking to Seaman Davis, Seaman Davis told you where the guy had been hit, didn't he? Told you he'd been hit and he'd been jabbed on the left side of the temple, didn't he?

A. He didn't tell me that on the 20th.

Q. Are you certain of that?

A. I'm pretty certain of that.

Q. Did he tell Special Agent Sentell that?

A. Not on the 20th.

[144] Q. If Special Agent Sentell would have said hit — that Shackleton — let me back up one question:

Q. Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

A. "Hit and jabbed."

Q. I'm sorry?

A. "Hit"—that Shackleton was "hit and jabbed." He was hit on the back of the head. In this temporal area, he received a jab. Nobody outside the medical autopsy, Dr. Conradi or the people that were very closely working with this investigation knew that he had been "hit and jabbed."

IO: Let the record reflect that the witness has pointed to her left temporal area with her . . . hand.

Q. Would Seaman Apprentice Davis have told Special Agent Sentell that on the 20th?

A. I have no notes of that specific information being reported by Davis on the 20th. I did not have that in my notes.

DC: No further questions at this time, sir.

MJ: Anything further, Captain?

TC: Yes, sir.

WITNESS: Yes.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. It is possible that the information that defense counsel was referring to was information provided by Petty Officer Guidry in a statement on the 4th of November?

A. It certainly sounds more closely related to that statement.

Q. Do you remember the accused saying anything remotely resembling that during your discussions with him on the 20th of October?

A. No. I recall nothing close to that.

[145] Q. Do you think that's significant enough where you would have made a note of that?

A. I certainly do.

Q. To the best of your knowledge, prior to your interview of Seaman Apprentice Davis on the 20th of October, was there anything did you can recall that would have led you to believe that Davis was in the receipt of anything more than knowledge gleaned from a rumor or from another person?

A. No, there was not.

Q. Was there anything that occurred during the interview that would have led you to believe anything different?

A. No, there was not.

TC: The government has no further questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Agent, you indicated that on the 20th, you did not suspect the accused in the sense of Article 31. When did he become a suspect?

A. Robert Davis became a suspect once we had information that he had, in fact, made a statement that he had killed the victim.

Q. Who was that statement made to?

A. That was a statement derived from Mull.

Q. Which was, apparently, on the 27th or so?

A. I believe that's correct.

Q. Now, Mull testified that it was common knowledge on the ship by the 27th that the accused was a suspect and that, of course, y'all were actively pursuing the case. What did he base that on? Obviously, you can't get inside his head but it appeared from his testimony that was sort of the common understanding on board Mahan that Davis was a focus of the investigation.

A. Yes, I had heard that, in fact, Davis had been considered by others to be a suspect, also that Bonnie Krusen had been considered a suspect. Jeff Kaiser had been considered a suspect. Practically everybody that we talked to for any length of time, we got word back that someone had—looking at them as a suspect.

Q. I'm more concerned about the official Mahan rather than the unofficial Mahan position. What was the official Mahan position? You [146] may sort of alluded to the fact that certain members of it's ship's company believed that he was, in fact, a suspect.

A. Yes, I do think that that was a common belief. I could not be surprised that the Executive Officer held that belief, however, when we first talked with him about interviewing Davis, tried to make it clear that we were doing

an interview as a witness, as we did all other witnesses, tried to make it clear that we were not suspecting them, and I think due to other problems that Davis had with the command and the statement that he had made earlier, that led them to believe that.

Q. Was this about the shooting?

A. Yes.

Q. Who was the "someone" that he was going to shoot? Did you—

A. The only specific on that was talking to his Division Officer, Davis' Division Officer, said that he felt he would shoot a cop because he knew they shoot back. So, it was just any police officer.

Q. So, it was no specific identifiable person, as far as you knew?

A. No. As far as I know, no.

MJ: Thank you, Agent. Any questions based upon the inquiry of the military judge?

TC: Not from the government, Your Honor.

MJ: Mr. Yandle.

RECROSS-EXAMINATION

Questions by the defense:

Q. Agent Clark, when did you first talk to Petty Officer Mull?

A. I may have talked to Petty Officer Mull prior to him giving a complete statement. I believe that that was around the 27th of October. I might be a little off on the date. I'm not sure.

Q. Could it have been the 1st of November?

A. It could have. It was the later part of October or the first of November. It could have been on the 1st.

Q. If I were to show a sworn statement that indicates the day of 1 November with Ronald Scott Mull's signa-

ture, your signature and Special Agent Sentell's signature, would it refresh your recollection as to the date?

A. Certainly.

[147] DC: If you would care to have me mark it as an Appellate Exhibit, I will.

MJ: No, I don't think that's necessary.

Q. So according to your testimony, it was not until y'all got that statement that you considered him a suspect?

A. To the best of my belief, that's correct.

Q. Do you know when Seaman Davis was admitted to the hospital?

A. He was admitted to the hospital shortly after we conducted an interview on the 20th.

Q. He was taken to the hospital on the 28th.

A. Okay, the following week.

Q. Aware at that time that individuals in the hospital as well as the command considered him a suspect?

A. I can—I would think that that would be entirely possible.

Q. Excuse me?

A. I would think that that would be entirely possible that others would consider him a prime suspect.

Q. Are you aware that the command, the USS Mahan, as early as 20 and 21 October were concerned about this individual's psychiatric well being?

A. Yes, I'm aware that on the 20th—

Q. And you are aware that they took action to have him evaluated because he was, in their mind, the prime suspect in this investigation?

A. I believe they had him evaluated because of statements he had made. I don't believe it had anything to do with this investigation.

Q. Is it a habit of the Naval Investigative Service to disregard the advice of an Executive Officer when he tells you that he has a suspect in an investigation?

A. We don't disregard what he says, but we have a much better handle of the entire scope of the investigation than any outside of our office.

Q. But certain individuals, including the Executive Officer of the Mahan, told you that this man was a suspect, and you didn't think it was important to try and rely or try and figure out why they might feel he's a suspect before you talk with him?

A. Well, they may have felt that he was a suspect, and we did talk with the Executive Officer before we did, and he did not have any information that would make Seaman Davis more of a suspect in the investigation.

[148] Q. But coupled with the rest of that information, you don't think it was reasonable to believe that he was suspect at that time?

A. We did not believe that he was a suspect at that time.

DC: Just a moment, sir.

[Defense counsel conferred.]

DC: Your Honor, if I may approach the witness.

MJ: You may, of course.

[Defense counsel continued to confer.]

Q. Agent Clark, when did y'all pick up Seaman Davis' service record?

A. That was some time after we interviewed him on the 20th of October.

Q. So, you picked it up on the 20th?

A. Was it on the 20th?

Q. I'm asking.

A. I don't believe so, no.

Q. When a squadron medical officer tried to review it on the 21st, it was not available. Would the Naval Investigative Service have had it at that point?

A. I don't believe so.

DC: Sir, may we have a short recess?

MJ: We're almost at 1300. Shall we take a luncheon recess? Would that be more appropriate?

DC: Sir, could we just have the witness step out. There is something we need direct with you that we prefer not to have done in the presence of the witness.

MJ: Very well, fine. If you would be kind enough to retire from the courtroom, Special Agent. Thank you. If you would just wait outside in the waiting area. Thank you, sir.

[The witness withdrew from the courtroom.]

CC: Your Honor, if it please the court. At a request made by the defense, the prosecution provides us what purports to be a medical record. We allege that this medical record is not complete. The reason we allege that is we have documents dated 21 October that are [149] not in this file, at least from our preliminary review. We would like the prosecution to make known to us if this is a complete medical record or it is not. We believe that there is more than one document that is of material importance to the defense of Mr. Davis that is missing from this file.

TC: The government hasn't seen that medical record. When it was delivered to the government, it was handed directly to the defense. So, as far as the government knows, it's a complete medical record.

CC: Your Honor, last week in a deposition, we were handed the medical—not a medical record but a material record in the examination of the forensic evidence that was changed by somebody in the government. There was a change in that record, a material change in that record, made from the time the discovery material was provided to us and it was retyped and it was in addition. We have a statement, and I proffer it to the court, that is dated 21 October '88; it's in his medical record we were provided a copy of, and it says "He is currently being investigated by

NIS as a suspect in a recent murder that occurred on base, although he denies involvement." Now, it also says "Service record not available of my review as NIS has it." Now, I allege that this document has been removed from the file. It's not in there. Now, maybe, we've made a mistake and reviewed the file and it may be in there. I cannot find it.

MJ: May I see that, counselor.

TC: The government's position is the defense is complaining about not getting something that's already in their possession.

CC: We are very grateful that it was given to us because it's material to the case, but it appears to be missing from the official record at this time.

[The military judge reviewed the document.]

MJ: Well, of course, the problem with this type of entry, we don't know what the author is relying upon. Is he relying upon some official representation by the command or is he just relating what the accused may have told him. So, I'm not denigrating your concern that, perhaps, it's not contained in the service record, but with regard to the contents, I think it's somewhat ambiguous.

CC: Well, he specifically says that NIS has the record. That wouldn't come from the accused.

* * * * *

[153] TESTIMONY OF NIS AGENT SENTELL

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please, state your rank—or state your full name.

A. Jeanmarie Sentell.

Q. And how do you spell your last name?

A. S-E-N-T-E-L-L-.

Q. Ma'am, who is your employer?

A. I work for the Naval Investigative Service.

Q. And what are your duties with the Naval Investigative Service?

A. I'm a special agent, criminal investigations.

[154] Q. Do you know the accused in this case?

A. Yes, I do.

Q. If he's in the courtroom today, would you point to him and state his name.

A. [Doing as directed.] Robert Davis.

TC: The record should reflect that the witness has correctly identified the accused. Your witness.

MJ: Mr. Yandle, I will ask you to conduct your examination in a normal way. If you are unable to elicit information from the witness, I will let you modify your approach. Fair enough?

DC: Aye, aye, sir.

MJ: Very well, why don't you proceed, sir.

Questions by the defense:

Q. Ms. Sentell, what's your relationship to the investigation in the death of Seaman Apprentice Keith Shackleton?

A. I'm one of the case agents.

Q. And what's your particular relationship with this case?

A. I'm sorry, I don't understand the question.

Q. Are you the agent in charge of the case? Are you the case agent?

A. The case agent.

Q. You are the lead agent for the Naval Investigative Service then?

A. No, I am not.

Q. Who is the lead agent for the Investigative Service on this particular investigation?

A. Oh, I thought you meant for my office. Please, excuse me. For this investigation, I am the lead agent.

Q. And what do your responsibilities involve as the lead agent in this case?

A. To gather all the information and put it together. Interviews. Compilation of information. Submission of reports.

Q. And are you required to communicate with the other agents that are assisting you?

A. Yes.

[155] Q. Now, if you would, please, explain to the Judge what information you, as the lead agent in this case and other agents of the Naval Investigative Service, to your knowledge, were aware of regarding Seaman Davis' participation in the Shackleton murder, which is alleged, as of 20 October 1988.

A. Absolutely nothing.

Q. Absolutely nothing. Again, the full extent of your —

A. Knowledge?

Q. —information—

A. About Mr. Davis?

Q. —about Seaman Davis being involved with that.

A. We had no knowledge that he was involved in the investigation. He is a pool player. He was at the Enlisted Club. He is an enlisted club member or patron. That's all we knew.

Q. That's all you knew? Absolutely?

A. That's it.

Q. Before you talked to Seaman Davis on the 20th of October.

A. Except for the statements or not statements, but brief interviews that we had with Petty Officers Guidry and Smith, moments before we talked to Seaman Davis.

Q. What did Petty Officer Guidry tell you?

A. That he had a conversation with Davis in berthing some time before the 6th of October and that Davis had

told him that—had asked him about if he knew anything about the guy that got killed behind the commissary, and he said that—Guidry didn't know anything about it, and so Davis apparently, reportedly, told him that Shackleton had been hit and jabbed with a pool stick, had been killed by being hit and jabbed with a pool stick.

Q. So prior to talking to Seaman Davis, you did know something about his participation, allegedly.

A. His participation? No, I thought he just might have some knowledge for us as a witness.

Q. What had the Naval Investigative Service done, if anything, to narrow the scope of the investigation regarding a possible weapon?

A. There was a secondary conference with a local medical examiner by the name of Dr. Conradi to review the autopsy, the photographs, crime scene photographs and so on and such forth. After we conferred with her, based on the information that we had about Shackleton's last activities, which was he was in the Enlisted Club and that he was last sighted near the pool tables, she said, well, the injuries look to be consistent with a long tubular shock absorbing object or some—or words [156] to that effect. We explained to her that he had been play—the victim had been playing pool, and she said a pool cue, butt end of a pool cue stick could have been used.

Q. So, would it then be—what was the date that you talked with Dr. Conradi?

A. 17 October.

Q. So prior to talking to Seaman Davis on the 20th, you did know that you were looking for pool sticks?

A. Possibly pool sticks.

Q. Did you know anything about whether Seaman Davis owned a pool stick?

A. Yes.

Q. So, you did know a little bit more than nothing about Davis, didn't you?

A. I told you that he was a pool player and went to the EM Club.

Q. Dr. Conradi told you that it was a cue stick or that it was—the murder weapon could have been a cue stick?

A. Could have been, yes.

Q. What information, if any, did the Naval Investigative Service glean from conversation with the proprietor of an establishment known as "Tucker's Pool Hall"?

A. Oh, Tucker's, I talked to the owner there, and I asked him a little bit about pool sticks, 'cause I know nothing. He informed me that they were made of oak which is a very hard wood. He said—I asked him if he'd ever seen pool sticks that had been used as weapons in bar-room fights or pool hall fights or anything along this line, and he said that, yes, he had seen quite few in his lifetime.

Q. So, would it be accurate to indicate that—well, what was the date that you spoke with the people out at Tucker's?

A. I believe it was the 18th of October.

Q. So, on the 17th and 18th, would it be accurate to say that you were narrowing the focus of your investigation to individuals with pool sticks?

A. We could probably say that, yes.

Q. What else did Mr. Tucker tell you about pool sticks?

A. Oh, I asked if they could be broken, and he said, yes, but he's usually only seen them broken or dented when they've been hit up against the side of a pool table or a cement object. After a fight that he's looked at pool sticks and they haven't even been dented when they've been used against somebody's body.

[157] Q. What about did he make any indication about the rubber bumper on the end of a pool stick?

A. I don't believe I asked him that question.

Q. Did he make any comment regarding it?

A. No, not that I recall. No.

Q. Explain to the court exactly what information Petty Officer Guidry provided to you.

A. Just that he had a conversation with Davis in berthing on the ship prior to the 6th of October. The conversation somehow got around to Davis asking Guidry if he heard about the guy that got killed, and Guidry told him that he'd been hit and jabbed by a pool stick.

Q. Who told whom?

A. Davis told Guidry.

Q. That victim had been hit and jabbed with a pool stick.

A. Yes.

Q. What information did you know as of the 20th of October as to the type of injuries that Seaman Shackleton had incurred?

A. I was at the autopsy. I saw the injuries.

Q. What were those injuries?

A. He had two lacerations on his—on the head the crown of the head and down half way below the crown of the head, half way between the neck and the crown of the head, and also a circular injury to his left temporal area.

Q. Would it be accurate to say that the information that Guidry provided you as to what Davis had told him was consistent with what you'd seen at the autopsy?

A. Yes.

Q. How much information had the Naval Investigative Service put out as of 20 October regarding the manner of death?

A. I know that we submitted one, what's called—no, we had not submitted any reports, excuse me, by the 20th of October, only to open up the investigation.

Q. How much information was generally available to the public as you are aware regarding the manner in which you believed Seaman Shackleton met his death?

A. I don't recall what the press releases were.

[158] Q. Would you characterize the volume of information as extensive or very limited?

A. It was not a long article that I recall, but I—my memory is—I don't recall how much information was passed out to the public. I know there was a whole lot of rumors all over the place.

Q. Would you characterize information regarding the injuries such as being hit and jabbed as being intimate knowledge?

A. Yes.

Q. Intimate knowledge that someone that was not within the law enforcement community or was not somehow involved with the incident would not have known?

A. Would not have known.

Q. So you had information as of 20 October, prior to talking to Seaman Davis, that he had intimate knowledge of the method of death as you understood it to be?

A. At that point in time, we were dealing with so many rumors, he could have gotten that information from any of the rumors or, possibly, he knew where the information came from and could possibly lead in that route. We did not suspect him.

Q. But you were aware that he had what you have previously described under oath as "intimate knowledge"?

A. Yes.

Q. Thank you. What information did you have regarding cue sticks that Seaman Davis might have owned?

A. I was told that he had a pool stick from other people that go to the EM Club.

Q. What kind of pool stick did he have?

A. He told us he had two.

Q. What kind had you been told that he had?

A. A pool stick, to the best of my recollection.

Q. A single continuous shaft or a shaft that can be borken down?

A. I don't believe that I asked that question.

Q. You never asked to know whether he carried a pool stick that was 5 feet long or one that was cut down, taken apart?

A. No, my assumption was when somebody owned a pool stick it was broken down.

[159] Q. So you assumed, based upon the information you had, that Seaman Davis owned several or, at least, owned a pool stick that could be broken down?

A. I was told that he had a pool stick, and that's all.

Q. So as of the 20th of October, would it be accurate to say that you knew that Seaman Davis owned a pool stick?

A. Yes.

Q. What information, if anything, did you have regarding Seaman Davis' presence at the enlisted club on the evening of the 2nd of October? All my questions, ma'am, are directed toward the knowledge which you had as of 20 October.

A. I don't believe that we even knew that he was at the EM Club on Sunday night, the 2nd of October. I don't think that was confirmed at all.

Q. Are you aware that Special Agent Clarke has indicated that he was aware that Davis had been at the club that evening?

A. On that particular evening? Please, excuse me. I've made a mistake. Tricia Downen, an interview with Tricia Downen and David Johnson—it may have been on the 18th. My recall has failed me.

Q. Is there anything that would refresh your memory? Do you have any notes of the conversation with Tricia Downen?

A. Oh, I'm sure I have.

DC: Your Honor, it might be appropriate at this point to break and allow the witness to obtain those notes to refresh her memory.

MJ: Captain?

TC: Sir?

MJ: Counsel for the accused has asked that Agent Sentell obtain her notes with regard to the particular interview he's interested in at this moment.

TC: The government's understanding it's for purposes of refreshing the recollection of the witness?

MJ: No, I think he wants to look at them. The question is whether she knew that on the 20th of October that the accused had been at the EM Club, and she indicated that she wasn't really sure. She first stated that they had no such knowledge, but now she thinks that perhaps on her interview of 18 October they may have learned that, and I think she indicated that she, perhaps, had notes of that interview.

[160] MJ: Is that a correct summary?

DC: Yes, sir.

TC: The government certainly has no objection to the witness refreshing her recollection, one way or another.

MJ: Well, apparently it's imperative. Special Agent, could I ask you to obtain your notes, and we'll take recess in order—

WITNESS: Do you want me to obtain them or just to refresh my memory.

MJ: Well, if you could bring them to the courtroom with you, please ma'am.

WITNESS: Okay.

MJ: Thank you, very much, and if I could ask you to bring any other notes that might pertain to any interviews, it perhaps would save all of us some time.

MJ: Court is in recess until recalled by the military judge. Thank you.

The Article 39(a) session recessed at 1444, 15 March 1989.

An Article 39(a) session was called to order at 1502, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. The members are absent, and Special Agent Sentell remains on the witness stand.

MJ: Very well, have you had an opportunity to review the notes, counselor?

DC: No, sir. Ms. Sentell has just come back in the courtroom.

DIRECT EXAMINATION (continued)

Q. Ms. Sentell, I assume that you have retrieved notes regarding the conversations you had had with Ms. Downen?

A. Yes.

DC: May I see those, if I could, please, ma'am?

TC: Your Honor, the government would object. If this is a *Jencks*-type of an inquiry, the government's would — the government's position [161] is that this is not a witness for the government. It's a defense witness, and the *Jencks* Act is not applicable. If the — the government has no objection to the witness using the notes to refresh her memory.

DC: Your Honor, the position is two-fold. One, this witness is obviously a witness who is aligned with the

government under 611(c). It allows leading questions when a party calls a hostile witness or a witness identified with an adverse party. The situation is such that this witness is one of the key — is the lead investigator in the case in terms of soliciting and searching for information which the government intends to use to support the capital death penalty in this particular case.

MJ: The witness indicated she needed the notes to refresh her recollection. Inasmuch as she's going to refresh her recollection, examining counsel has an opportunity to see the notes nevertheless, right?

DC: We believe so, sir.

MJ: So it really isn't a *Jencks* problem. We don't have to reach that.

Very well, won't you take time to refresh your recollection, Special Agent, and if you'd be kind enough to allow Mr. Yandle to inspect them.

[Defense counsel was handed the notes for his review.]

DC: Thank you, ma'am.

MJ: Thank you. By the way, let me just note that *Jencks Act* is more restrictive than the traditional military rule of discovery, by the way.

DC: Understand, sir.

MJ: For further reference.

TC: The government would just ask to inquire of the witness what the notes are that have been provided to counsel.

MJ: If you'd like.

TC: What notes are those? Are those notes from an interview?

WITNESS: From talking with Tricia Downen and David Johnson and a third person by the name of Rich — and his name is on — Paschard, I think.

[162] TC: The notes of interview from Tricia Down, David Johnson and a third party by the name of Richard or Rich?

WITNESS: Rich. Referred to as "Rich."

TC: Thank you.

DIRECT EXAMINATION (continued)

Q. When were these notes made?

A. The date is up on the front.

Q. And that date is what, please?

A. I believe it is dated the 18th of October.

Q. And in comparison to the interviews that were conducted with these individuals, when were these notes made? During the interviews? After?

A. During the interviews.

Q. So, as you were speaking with the individuals, you were taking essentially shorthand-type notes of what they were saying.

A. Correct.

Q. Now, you mentioned through your notes several individuals, often, by first name. One is Dave. Who is that, please, ma'am?

A. David Johnson.

Q. And Richard?

A. I cannot recall his last name.

Q. How about Jeff?

A. Jeff is Jeff Kaiser.

Q. And Bob?

A. Bob is Robert Davis.

Q. I believe on the third page of your notes, you indicate that "owns pool stick per Tricia, Dave and Rich," and listed under there is Bob Davis.

A. Do you want me to explain what I—

Q. Yes, ma'am, does Bob Davis listed under that indicate your notes say that Ms. Downen told you that Bob Davis owned a pool stick?

A. Yes.

[163] Q. Thank you. And if you turn to the next page, the bottom indicates "Jeff left the club at approximately 1145; Bob left near closing." Does that also indicate that Seaman Davis left the club near the closing time?

A. Yes.

Q. And that would be on what date, please, ma'am?

A. The 18th.

Q. On what date would they have left the club?

A. We were talking about the night of the 2nd of October.

Q. So, in fact, on the 18th of October, you did know that Seaman Davis had been in the Enlisted Club on the evening of the 2nd of October?

A. Per Tricia Downen, yes.

Q. So you now have information that Seaman Davis owned a pool stick. You also have information that Seaman Davis was in the club on the evening when Seaman Shackleton was killed, correct?

A. Correct.

Q. What information did you have regarding absences by Seaman Davis, unauthorized absences from his command?

A. On the 19th of October, went aboard to try and interview Seaman Davis. At that particular time, when I was up on the quarterdeck, they said that he was UA.

Q. Were you also aware of him being UA on the 3rd of October.

A. No. Not at that time.

Q. Are you certain?

A. I'm positive.

Q. Would you be surprised to hear that Special Agent Clark was aware that Seaman Davis had been UA on the 3rd of October?

A. I would be very surprised.

Q. When you had gotten on board on the 20th of October, on board the Mahan, where were you conducting your interviews?

A. Up in the Admiral's stateroom.

Q. Could you describe the layout for that for me.

A. You enter through the passageway that's across from the Captain's office. There's a round table directly to the left of the entrance to this cabin area with a bench style, semicircular seated area behind this table and two regular chairs. There's also, like, a small coffee mess over on this left side or where a coffee mess could be. There was no coffee. There was a desk in the room slightly to the right of the [164] entrance, and, if you passed by the desk, you would go into a berthing area.

Q. I assume that interviews were conducted only in the outer area with the desk and the table and the coffee mess.

A. We didn't even go as far as using the desk. We used just strictly the table.

Q. Who was present in the room?

A. At what point in time?

Q. When you were doing the interrogations.

A. During the interviews?

Q. Yes, during the interrogations.

A. We interviewed a group of people at the desk and—excuse me, at the table, Keith Clark and myself and then whoever we were interviewing.

Q. So there would have been total of three people in the room.

A. Correct.

Q. Who escorted Seaman Davis to the flag cabin that afternoon?

A. I don't know. I didn't see who escorted him.

Q. Was it a master-at-arms?

A. I know that there was a master-at-arms sitting with him earlier.

Q. Do you remember speaking with a Petty Officer Marlowe Smith?

A. Yes.

Q. What did Petty Officer Smith tell you?

A. That he was just sitting down—I'm not really clear what office he was sitting near—I think, maybe, the master-at-arms office while were talking to Guidry. Apparently, the reason being was Davis just returned from being UA, and he was sitting down there waiting for us, and he said that Davis was just real talkative and said that he didn't kill the guy but he knew who did it.

Q. So, you've got other information that Seaman Davis had some type of intimate knowledge of the circumstances involved with the death of Seaman Shackleton?

A. Yes.

Q. Prior to speaking to Seaman Davis?

A. Yes.

[165] Q. What had you been made—excuse me, what did you know prior to talking to Seaman Davis on the 20th of October regarding his statements that he might need to kill a cop to get some kind of reaction?

A. We were told that on the 20th just before we interviewed Guidry, Petty Officer Guidry.

Q. What were you told?

A. That the command was concerned about Davis' mental stability. He'd made some rash statements to his Division Officer, and they were concerned about that.

Q. Did the Executive Officer of the Mahan also tell you that he suspected Seaman Davis in this case?

A. I have no recall of that.

Q. Do you remember Petty Officer Marlowe Gene Smith telling you that Seaman Davis was extremely nervous and talkative, that he informed Petty Officer Smith that he didn't kill the victim but he knew who did and he wasn't going to tell unless it looks like he was going to get blamed for the death?

A. Yes.

Q. And you were aware of that prior to Seaman Davis entering the flag quarters where you and Special Agent Clark interrogated him?

A. Where we interviewed him.

Q. You were aware of that prior to him entering that cabin, yes or no.

A. Yes, with Marlowe Smith, yes.

Q. What did Seaman Davis tell you during that interview or interrogation?

A. Basic synopsis. We showed him a photograph of the victim, and he said that he recognized the face, but he did recognize the name, that he'd shot pool with him. He confirmed that he was the club because that was still a question in our minds as far as was he or was he not at the club on the 2nd of October. He, pretty much, explained what he did that night.

Q. What kind of intimate details regarding the method of death in this case did he convey to you?

A. He said that he had heard that the guy had been beaten with a pool stick from Bonnie and Wade — Bonnie Krusen and Wade Bielby. That was after I asked — one of us asked the question: when did he find out about this guy getting killed, and he said, "Oh, about three days later after the guy got killed." He heard it from Wade and Bonnie, and they said he'd gotten beaten with a pool stick.

[166] Q. When did he tell you that he'd been hit and jabbed?

A. He didn't tell me he'd been hit and jabbed. He said "beaten."

Q. Are you certain that he didn't say "hit and jabbed"?

A. No. He did not use those terms in the interview that we had on the 20th of October.

Q. Do you remember testifying at an Article 32 investigation back in early December?

A. Yes.

Q. In this particular case?

A. Yes.

Q. Do you remember the question:

Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

Do you remember that question?

A. Could you repeat that, please.

DC: If I might, sir, could I approach the witness?

MJ: You may, sir.

Q. Ms. Sentell, this is page 114 of the transcript of the Article 32 investigation. If you would, please, read the highlighted portions of that.

A. [Doing as directed.]

Q. Could you read the highlighted portion, please.

A. Yes. "With some specificity, what were the things he revealed? 'Hit and jabbed.'" Now, I believe that this is not what we're talking about as far as the —

Q. Could you, please, just read the highlighted portion, question and answer.

A. I believe it is taken out of context. This is not what I said that Davis told me during the 20th of October interview.

DC: May I retrieve the document, sir?

MJ: You may.

[167] Q. Are you indicating that that's not a verbatim transcript?

A. Yes, that appears to be the transcript.

Q. But the verbatim transcript is inaccurate, is that what you're saying?

A. No, I'm not saying that, but I don't think that that was in relation to the information that I, personally, gathered from Seaman Davis on the 20th.

Q. Ma'am, let's go back a little bit then. A series of questions involved an affidavit which you prepared for the search authorization.

A. Right.

Q. Question: "Again, I'm referring back to the affidavit which you provided or you signed, . . . on 1 November of 1988." This is according to page 113 of the verbatim transcript.

The affidavit begins "Robert Lee Davis was admitted to the Naval Hospital. In the body of that affidavit, it says "During the interview of Davis," and we've established that that interview is the interviewing you're referring to as 20 October, is that correct?

A. Correct.

Q. Answer: "Yes."

Question: "And then the affidavit continues that 'During that,' what I'm assuming is the 20 October interview, 'he,' the accused, 'provided information regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials.' "

Answer: "Okay, now I understand."

Question: "And what I was asking you earlier . . . that would be privileged information, privileged in

the same sense that it was—he had learned about the crime either through law enforcement officials or from somebody who saw the crime scene committed or somebody who told them about it?"

Answer: "Intimate knowledge."

Question: "Intimate knowledge." Answer: "Okay."

Further down on page 114, and you're indicating this has been taken out of context, what I'm trying to do is put it back into the context as it is in the verbatim transcript.

"With some specificity, what were the things he revealed?" Answer: " 'Hit and jabbed.' "

[168] Q. Is that correct?

A. I was referring to Guidry's information passed on to us that Davis had provided to him.

Q. Ma'am, the question which you answered under oath was this:

Question: Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

Answer: " 'Hit and jabbed.' "

Q. Was that your testimony?

A. Obviously, I was mistaken because he did not say "hit and jabbed" during the interview. Guidry told us "hit and jabbed."

Q. Next question: "I'm sorry?"

Answer: " 'Hit' "—that Shackleton was " 'hit and jabbed.' He was hit on the back of the head. In this temporal area, he received a jab. Nobody outside the medical autopsy, Dr. Conradi or the people that were

very closely working with this investigation knew that he had been 'hit and jabbed.' "

IO: Let the record reflect that the witness has pointed to her left temporal area with her left hand.

A. That's the information that was passed on to us by Guidry.

Q. But, ma'am under this sworn testimony which you gave at the 32 investigation, you have repeatedly said that that information came from the 20 October questioning which you described as an interview.

A. My recall of the interview with Seaman Davis is that he—that the victim was beaten with a pool stick.

Q. Do you have any notes of that interview?

A. With Davis?

Q. Yes, ma'am.

A. On the 20th, I have a very, very brief—Mr. Clark was the one that was taking the notes.

Q. Question—top of page 115:

Was the information provided by Davis pertaining to the injuries sustained by Shackleton given at the beginning or the middle or the end of that interview?

Answer: Which particular interview are you talking about?

[169] Question: 20 October.

Answer: 20 October, we talked with Petty Officer Guidry before we talked with Davis, and we asked Davis where he got that information. He said he got it from Bielby.

Q. During the 20 October interview of Davis is what we're addressing. Is it your testimony today that your testimony in December was wrong?

A. What I was saying as far as pointing to my head—I remember pointing to my head, "hit and jabbed," was what Guidry told us.

Q. Ma'am, that—so, what you're saying is that your testimony that's transcribed for several pages was completely wrong?

A. No, I'm not.

Q. After you had been given repeated direction to a specific time and a specific interview, you still provided inaccurate information?

A. I must have misunderstood the question.

Q. Ma'am, you—

TC: Your Honor, the government is going to object. The witness has given a response.

MJ: You're asking the same question and you're getting the same response, Mr. Yandle. You've made your point. Should you move on, please, sir?

Q. On the 20th of October, when you and Special Agent Clark were talking to Seaman Davis in the—at sea in the flag cabin, did you make notes of that interrogation or interview?

A. No. The only thing I took down was Seaman Davis' personal data.

Q. Are you certain of that?

A. Yes.

Q. Absolutely.

A. Yes, because Mr. Clark was the one—

Q. Do you have those notes?

A. Mr. Clark was the one that was keeping the interviews for the—or the notes for this particular interview.

Q. Do you remember a question at the Article 32 that says:

During the course of that 30 minute interview, when did he provide that information? The beginning, the

middle or the end?

Answer: I would have to refresh my memory by looking at the notes that I have on this.

[170] Question: But it would be in the notes?

Answer: Yes.

Question: And you have those notes available?

Answer: Yes.

Q. Do you have those notes?

A. They're with—they're Mr. Clark's. What we do is we combine them.

Q. Your answer, ma'am, was, "I would have to refresh my memory by looking at the notes that I have on this."

A. Yes.

Q. And now you're telling us that you had no notes on it?

A. Mr. Clark and I have an agreement that some times he takes notes, and some times I take notes. We go over the notes after the interview to make sure that everything is in there, and we consider it "our" notes.

Q. At any time prior to Seaman Davis delivering a pool cue or cues to you, did you ever exercise a permissive authorization for search and seizure form?

A. No.

Q. Never verified that Seaman Davis was aware of the formalities of consenting to searches?

A. Formalities? I asked him voluntarily.

Q. But you didn't think it important to preserve that issue by executing a simple document known as a permissive authorization search and seizure?

A. No, it did not cross our mind.

DC: Just a moment, sir.

MJ: Yes, sir.

[Defense counsel conferred.]

DC: Sir, could we have about a five minute recess?

MJ: Promise five minutes?

DC: Yes, sir.

MJ: Very well, five minutes, please.

[171] The Article 39(a) session recessed at 1530, 15 March 1989.

The Article 39(a) session was called to order at 1533, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. Special Agent Sentell is still on the witness stand.

MJ: Please, proceed, sir.

DC: Thank you, sir.

DIRECT EXAMINATION (continued)

Q. Agent Sentell, you'd indicated earlier that you were aware that Seaman Davis had been in the Enlisted Club on the evening of the 2nd of October from your interview with Tricia Downen, correct?

A. Correct.

Q. Do you remember an interview with Fireman Apprentice David Frederick Johnson conducted on the USS Sierra on the 18th of October?

A. Yes. He's the one that saw him leaving, Davis leaving.

Q. So you had two separate sources of information that Seaman Davis was at the Enlisted Club on the 2nd of October, correct?

A. In my notes, I interviewed Downen and Johnson together, and I remember that it was a combination interview and that it might have been Johnson that told me that he left near closing.

Q. But you had clear information two days prior to the time that you spoke with Seaman Davis placing him at the Enlisted Club around the time that you believe Seaman Shackleton was last seen alive, correct?

A. Correct.

DC: No further questions at this time, sir.

MJ: Gentlemen, do you have any questions of the agent, please?

TC: Yes, Your Honor.

[172] **CROSS-EXAMINATION**

Questions by the prosecution:

Q. Special Agent Sentell, Seaman Apprentice Davis wasn't the first witness you interviewed in conjunction with this death investigation, was he?

A. Absolutely not.

Q. In fact, you interviewed quite a few witnesses prior to interviewing Seaman Apprentice Davis?

A. Numerous. Numerous people.

Q. And you also interviewed a lot of witnesses after interviewing Seaman Apprentice Davis, correct?

A. Yes.

Q. A lot has been made of some testimony of your at the Article 32 investigation. In response to a 39 word question, you gave the answer "hit and jab" with regard to some information that the accused has revealed, correct?

A. I beg your pardon?

Q. In response to the question, you were asked on direct examination concerning the question:

Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were those things he revealed?

Q. In response to that question you answered, "Hit and jabbed."

A. Correct.

Q. That question didn't say to whom revealed, is that right?

A. That's—yes.

Q. And so it was your understanding—

A. My understanding was that the information was from Petty Officer Guidry.

Q. And that was an imprecise question, in other words?

A. I believe so.

Q. It just said things revealed by Seaman Apprentice Davis.

A. Yes.

[173] **Q.** And it didn't say specifically to whom, correct?

A. To whom, no.

Q. Now when you interviewed Seaman Apprentice Davis on the 20th of October, he wasn't a suspect, was he?

A. Absolutely not.

Q. Was he just a witness in the case?

A. Strictly a witness.

Q. Was he treated any different than any of the many other witnesses you had interviewed prior to the 20th of October?

A. No.

Q. Obviously, Seaman Apprentice Davis on what information you had from Petty Officers Guidry and Smith, obviously, Seaman Apprentice Davis had information not generally known, correct?

A. Correct.

Q. As far as you know, was he in receipt of anything other than information obtained by rumor, for example?

A. I had no knowledge of anything other than rumor. There were so many going on at the time.

Q. And, in fact, when you interviewed Seaman Apprentice Davis, he explained how he happened to have information concerning the case, isn't that right?

A. He said he heard it from somebody else.

Q. And specifically he told you he heard it from a Wade Bielby and a Bonnie Krusen?

A. Correct.

Q. In fact, as a result of what proved to be false information provided by the witness, now the accused, NIS wasted a considerable degree of investigative effort, didn't they?

A. Yes.

Q. His statements concerning Bonnie Krusen and Wade Bielby caused you to scrutinize their activities, correct?

A. Oh, yes. Did a lot of investigative steps on that.

Q. And the investigation, this more detailed investigation of those two individuals was a result of information you obtained from the witness, Seaman Apprentice Davis, correct?

A. Correct.

[174] Q. Now you testified that you didn't obtain a permissive search authorization for the pool cue sticks, correct?

A. Correct.

Q. There's nothing that requires a permissive search authorization if the material is surrendered to you, is there?

A. No.

Q. The accused willingly surrendered these cue sticks to you?

A. Yes, he did.

Q. Did you have to threaten him with obtaining a search authorization or anything like that?

A. No.

Q. Would it be fair to say that the accused was cooperative?

A. Very cooperative.

Q. As far as you can tell, did he appear to be hiding any information?

A. No.

Q. Was there anything about his actions that led you to believe that he was anything other than a witness?

A. Nothing. He was strictly a witness.

Q. Did you seize any other cue sticks other than those that were given to you by Seaman Apprentice Davis?

A. Yes.

Q. Approximately how many others?

A. Three others. Three other individuals gave me —

Q. From three other individuals?

A. Three other individuals.

Q. Did you take a cue stick from Bonnie Krusen?

A. Yes.

Q. Was that in part because of what Seaman Apprentice Davis told you?

A. We were taking — not "taking." We were asking if we could examine all the pool sticks that we could identify, personally owned pool sticks identified to individuals that frequented the EM Club.

Q. Was the cue sticks of the accused, were those the first cue sticks that you obtained?

A. No, they were not.

[175] Q. Were they the last ones?

A. No, I believe they were right in the middle.

TC: The government has no further questions.

MJ: Mr. Yandle.

DC: Just a moment, sir.
[Defense counsel conferred.]

REDIRECT EXAMINATION

Questions by the defense:

Q. Ms. Sentell, you'd indicated that as a result of the information that Seaman Davis had given you, you had to go back and do some other investigations. How many times did you speak with Seaman Bielby throughout this investigation?

A. Approximately two or three times.

Q. Can you give me dates on those that you spoke with him?

A. No, I cannot.

Q. But you remember speaking with him on two or three occasions?

A. I say approximately two or three occasions.

Q. You're the case agent in this, correct?

A. Yes, I am.

Q. The reporting agent?

A. Yes, I am.

Q. You're the individual who's responsible for compiling all the information?

A. Correct.

Q. How many times did Naval Investigative Service agents contact Personnelman Seaman Wade Bielby?

A. I have no idea.

Q. Yet, you're telling the court that y'all expended vast amounts of time and effort tracking information down?

A. Yes. We've got hundreds of interviews.

Q. But you're telling the court you tracked vast amounts of information, you've expended vast amounts of Naval Investigative [176] Service resources tracking down information on Wade Bielby that Seaman Davis provided. Can you elaborate on what that was?

A. "Vast amounts" is your term. We proceeded on checking out his activities. We already knew that — he said that he had been to the Howard Johnson's with Bonnie directly from the EM Club. We checked that out. We checked Holiday Inn records. We tracked down the person that was on duty at the Howard Johnson's. We talked to the person — there were some personnel on Bonnie's ship —

Q. With the interviews that y'all had conducted with Seaman Bielby, how many times did NIS agents conduct interviews —

A. With Seaman Bielby?

Q. — with Seaman Bielby?

A. [No response.]

Q. Are you aware of any other interviews of Seaman Bielby other than one done by Mr. John Lemire on the 11th of October and one done by you and Mr. Clark on the 9th of January?

A. I can't recall at this time.

Q. Now, obviously, Naval Investigative Service had information regarding Wade Bielby prior to you ever having spoken to Seaman Davis, correct?

A. Yes.

Q. How many interviews were conducted of BM3 Bonnie Krusen?

A. I do not know. I don't recall the number.

Q. The individuals that you were able to identify as owning cue sticks, who were the four that you took cue sticks from?

A. Jeff Kraiser, Bonnie Krusen, Wade Bielby and Seaman Davis.

DC: Sir, we have no further questions at this time.

MJ: Recross, sir.

TC: Prior to making a determination whether the government will recross, the government would request

permission to reprove the notes of Special Agent Sentell. We haven't reviewed those.

MJ: Very well, would you provide those, please, to counsel.

[Doing as directed.]

MJ: Thank you.

[177] **RECROSS-EXAMINATION**

Questions by the prosecution:

Q. Special Agent Sentell, in your notes from your interview of David Frederick Johnson and as well as those of Tricia Dowen, you were provided information concerning a number of individuals who played pool at the Enlisted Club with their own cues, correct?

A. Yes.

Q. For example, one of those was an individual by the name of Jeff who had his own—who was at the bowling alley and then came to the club afterwards and had his own pool cue in a brown case.

A. Okay.

Q. Does that sound accurate?

A. Uh-huh.

Q. So the accused was one of a number of individuals?

A. One of a number of individuals, yes.

TC: The government has no further questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Special Agent, when you and your colleague interviewed the accused on the 20th of October, you dealt with him in a manner that would—you've testified that he was not suspect. Was there a particular focus at that time with regard to the investigation? Was there anyone that was,

for the want of a better term, targeted as a possible suspect?

A. Absolutely not.

Q. With regard to the permissive search, you indicated that no prescribed form was used, is that correct?

A. Pertaining to obtaining the cue sticks?

Q. The cue sticks, correct.

A. No. No, we asked if on a voluntary basis, made it very clear that nobody was being forced into turning over a pool stick, nothing like that.

Q. What precisely did you tell him in that regard, ma'am?

A. Mr. Clark is the one that spoke to him directly about that particular incident.

[178] Q. Do you recall of your own knowledge—

A. He said that "Do you mind if we take this for examination?"

Q. I meant, let's return, please, to the flag quarters on board Mahan.

A. Okay. All right.

Q. What did Mr. Clark tell Seaman Davis regarding the request for search or seizure of the cue sticks?

A. Asked him if we could take a look at the pool sticks, explained it was purely voluntary.

Q. What did Davis say in response, if anything?

A. He said, "Okay," but the sticks weren't there. They weren't on board ship.

Q. And then what happened?

A. He said that they were over at his girlfriend's house, and he couldn't get off the ship because he just came back from being UA, and I said—we told him, "Well, that could be arranged, that we could get him off the ship to go get his pool sticks. He said, "Okay." He was very, very cooperative.

MJ: Very well, bear with me, please.

WITNESS: No problem.

[The military judge reviewed his notes.]

Q. Just so the record will reflect and I'm better informed, the body was found when?

A. The 3rd — well, the morning of the 3rd of October, like 5:00 in the morning.

Q. That would have been a Monday then.

A. On a Monday morning.

Q. So the night we're talking about is a Sunday night.

A. Sunday night.

Q. What time does the EM Club close?

A. 12:30.

Q. 12:30, so, 0030.

A. 0030.

[179] Q. Is it safe to say that in North Charleston, there's not an awful lot to do on a Sunday night as far as entertainment?

A. There are a couple of clubs open after that time.

Q. Oh, there are, very well.

A. Out in town, but not on base.

Q. The question was asked, and, I'm sorry, I don't remember what Special Agent Clark said. My notes are somewhat ambiguous. Were you aware of a purported unauthorized absence of the accused in that he failed to report for quarters on Monday morning, the 3rd of October?

A. We became aware of that. I believe it was on the report chit.

Q. When did you become aware of that, please, ma'am?

A. Right around the same time that we interviewed Davis and I really do not recall specifically if it was right before or right after or sometime in that general time period. I wish I could be more specific.

MJ: Very well, fine. Thank you very much. I have no other questions. Any questions based upon the inquiry of the military judge?

DC: No, thank you, sir.

TC: No, Your Honor.

There being no further questions, the witness was excused subject to recall and withdrew from the courtroom.

MJ: With regard to the 3 October unauthorized absence, at first I thought that Mr. Clark was talking about that absence and then I got the impression he was talking about the 19 October to 20 October absence. So, I must confess that I am a little confused. I'm not sure what Special Agent Clark indicated during this testimony. Again, I thought I knew and then my notes indicated that I had confused it with the later period. So, I don't know if counsel want to clear that up, how important counsel consider that to be. Is it possible, maybe, a review of the NISO report would clear up the question.

MJ: Very well, can we proceed, please?

TC: The government has no other witnesses with regard to 20 October interview or the cue sticks.

MJ: Mr. Savage? Mr. Yandle?

DC: Sir, could we have just a moment to check on it, check our notes of Agent Clark's testimony.

[180] MJ: Very well. I do remember him saying that it was his understanding that the accused had overslept at his girlfriend's house. Well, that would fit either day. So, that's not revealing.

[Recording device off.]

MJ: . . . recess rather than we all sit here watching each other going through our notes. About five minutes sufficient, counsel.

The Article 39(a) session recessed at 1558, 15 March 1989.

* * * * *

MJ: Very well, the motions are respectively denied. Those, of course, are motions that, perhaps, could appropriately be raised at a later juncture if the situation so dictates.

MJ: Anything else we can take up? Mr. Roach? Gentlemen?

ATC: Not that trial counsel is aware of that could be taken care of a few short minutes until the witness comes back, Your Honor. Your Honor, please, let the record reflect that Captain Thompson has entered the courtroom. [183] Mr. Keith V. Clark, Naval Investigative Service, civilian, was called as a witness for the court, was reminded that he was still under oath, and testified as follows:

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Mr. Clark, I've asked you come back because I was confused, and you may recall that we were discussing periods of unauthorized absence of the accused, Seaman Davis, and I believe you indicated that on the particular morning or that you interviewed him on 20 October, he had been an unauthorized absentee.

A. Yes.

Q. Were you aware at that time of a previous absence, specifically, the morning of the 3rd of October? —

A. At that time, on the 20th of October when I interviewed Davis, I do not believe that I had that knowledge. This personnel jacket and records were reviewed on the 25th. I don't believe it was until that date that I knew that he was UA on the 3rd of October.

Q. Now, you did testify that—bear with me, please, sir. [Examining his notes.]—that you knew that he was UA on the 3rd of October and the 20th of October. When

did you become aware of the two separate circumstances of unauthorized absence?

A. In my earlier testimony, I was unsure of when the date was that we received the service records. I feel sure now that information came from the reviewing of his service records, and I don't believe that I had that knowledge until the 25th. We were told on the 20th of his absentee on the 19th. So, I did have the knowledge.

Q. You indicated that the representations of the command, perhaps including the Executive Officer, stated or were of a mind that Davis was, in fact, a suspect, and would you, once again, recount what you're understanding of his position may have been. What did he base that on as far as you were aware, sir?

A. The only information that I know he had to base that on was the fact that we, myself and Special Agent Sentell, were interested in talking with him, and I don't recall what the exact words were, if the Executive Officer actually said that he considered him a suspect. I got that impression that he did.

Q. At that time, did he indicate to you that his suspicions were aroused by his absence on 3 October, the day after the death of Shackleton?

A. Not to my knowledge.

[184] MJ: Thank you, Special Agent. I have no other questions. Do counsel have any questions, please?

CC: May it please the court.

MJ: Certainly.

CC: Is it okay if I question?

MJ: Oh, yes, we're not going to stand on the usual protocol. You may proceed, sir, please.

EXAMINATION BY THE DEFENSE

Questions by the civilian counsel:

Q. With respect to the information provided by the command, and based on your training as an investigator, would you or would you not have requested information from the command so that you could conduct a knowing and intelligent interview of a witness or a suspect? Didn't you have any background information before you started taking people off the ship and questioning them?

A. Well, we did have some background information on Davis.

Q. And what background information did you have on Davis on 20 October when you commenced your interrogation from the command?

A. The information that we had from command when we interviewed Davis on the 20th was that he had been UA the day before and that he had made some statements which concerned the command about his mental state.

Q. What relevance, Agent, did his unauthorized absence on 19 October have to do with this investigation?

A. None that I knew of.

Q. What relevance would an unauthorized absence of 3 October have to do with his investigation?

A. That would have relevance in that that was the morning that the victim was found.

Q. And that was relevant to you, and, in fact, you had made inquiries from various commands about the absences of members of 3 October as well as injuries that members of the Navy had reported to various health facilities within the Navy command, isn't that correct?

A. I believe inquiries were made of those, yes.

Q. So that would be an important ingredient to you as of 20 October?

A. Yes, it would.

[185] Q. And you have a NIS identification of inquiries made as to UA's of 3 October, isn't that correct?

A. Of various inquiries?

Q. Yes, sir.

A. I have no direct knowledge.

CC: Beg the court's indulgence.

MJ: Surely.

[Defense counsel conferred.]

Q. When did you first look at the service jacket, if that's the proper terminology, of Mr. Davis?

A. That was reviewed and not picked up by myself originally, but it was obtained on the 25th of October.

Q. You're absolutely, positively, unequivocal that NIS did not receive that jacket until 25 October?

A. Well, I did not see the jacket before that.

Q. When I say "you," I don't mean in the singular but in the collective of you as a representative of NIS. Didn't NIS have that jacket as of 20 October?

A. Not to my knowledge.

Q. Isn't there a record somewhere within NIS as to when that jacket was received?

A. I believe there is.

Q. And couldn't you go and review that document and bring that document back here for us to make sure of when NIS had that jacket?

A. That's very possible, yes.

Q. And did you do that in preparation for your testimony today?

A. I did look at a document where we received the jacket on the 25th of October.

Q. And what document is that, sir?

A. This is a results of review of the service jacket.

Q. And has that document been provided to Captain Thompson?

A. I believe it has.

Q. When was it provided to Captain Thompson?

A. I really couldn't say what date.

[186] Q. Before today?

A. Yes.

CC: Do you have that?

TC: It's been previously disclosed, Your Honor. I can give you the exact date.

Q. What inquiries were made by NIS agents regarding unauthorized absences of members of the Navy? Do you recall that?

A. I don't recall specifically on what other agents were inquiring about or told to inquire on that. I do recall that on one occasion, we did look through UA's on the Mahan.

Q. On the Mahan?

A. Yes.

Q. What date was that, sir?

A. Again, this was some date after we had — after the 20th.

Q. Is there a record of that?

A. I'm not sure if there's a record of that or not.

Q. Was there any other inquiries of any other UA's in any other commands by NIS? Any inquiries made by NIS of other commands?

A. I don't know that there was any inquiries to any other specific commands.

Q. If there had been an inquiry, wouldn't that be a good investigative tool to look to see if anybody was UA on the 3rd of October, the morning that this fellow's body was found? I mean, wouldn't that make sense as an investigator to do that? Wouldn't that be one of the first things you would do?

A. I wouldn't say that would be one of the first things that we would do considering that we would be looking at every command in the naval station, naval base.

Q. When was the first inquiry made by NIS of UA's?

A. I really don't know.

CC: Let me show you a document if the court gives me permission to approach.

MJ: You may, sir, of course.

Q. What is the date that this document was prepared?

A. This document was prepared on 11 October.

[187] Q. And when was it typed up?

A. It was typed on 3 March of '89.

Q. Prepared on 11 October '88, typed up on 3 March '89, is that correct?

A. That's correct.

Q. Is that not a document that indicates that NIS made inquiries of UA's on 11 October?

A. Yes, it does.

Q. Now, I'm going to ask you the same question I asked you earlier, Agent. When did the UA investigations commence by NIS?

A. At least by 11 October.

Q. Now, what commands were questioned by NIS regarding UA's and on what dates?

A. According to this document, UA, unauthorized absence, was requested from UA personnel on the USS Orion.

Q. On what date?

A. This is on 11 October.

Q. And when was the same document generated for the Mahan?

A. That I do not know.

Q. And where is that document?

A. If that document exists, it would be in the case file.

Q. Why would the document not exist?

A. If there was no entries or if there was no substantive information gained from that.

Q. Well, certainly if the inquiry was made, they would have learned that Davis was absent on the 3rd and that would have been very important to this investigation, wouldn't it? I mean, he is the accused.

A. Yes, he is at this time, and, like I said, I didn't do that inquiry. I may not have personal knowledge of it.

Q. Who would have that knowledge?

A. Possibly Special Agent Sentell.

CC: May I approach, Your Honor?

MJ: You may, of course.

CC: May I retrieve the document?

[188] MJ: Certainly. Do you wish that marked as an Appellate Exhibit, counselor? There is no problem making a copy of it. It will be returned to you. That's no problem, is it, Mr. Arenberg?

REPORTER: This will be Appellate Exhibit XXVII.

Q. I know this has been a long day and that you've—what time did you come on the stand this morning? Weren't you on before the luncheon break?

A. I believe it was around 10:15, 10:20.

Q. Since this morning, have you had an opportunity to refresh any notes or reports of investigations, handwritten notes or anything to refresh your memory so that it would be better this afternoon than it was this morning?

A. I have had the opportunity to review interviews pertaining to this time frame.

Q. What specific notes have you had an opportunity to refresh since your testimony this morning?

A. Just the interview with Davis on the 20th October, the interviews with Guidry on the 20th.

Q. And those are the notes that—the handwritten notes you provided us this morning, correct?

A. That's correct.

Q. Any other documents besides that, Agent?

A. That and I did look at a document that showed that we received the service record on the 25th of October.

Q. Did you have an opportunity to speak to your superiors regarding the inquiry made of the unauthorized absence on 3 October?

A. I did not.

Q. How did you obtain then the record? Where is that record that you obtained?

A. Oh, the record of the—getting the record, the service record, on the 25th?

Q. The record of obtaining the record, right?

A. Okay, that I got by talking with Special Agent Sentell, looking at the service—or actually the case file.

Q. So, you did discuss then with Agent Sentell the whereabouts of the documentation of the UA of 3 October with respect to Davis?

A. I did discuss as to where that document was. I was inquiring when I got that service record.

[189] Q. And Agent Sentell is, in fact, the one who is the reporting agent for the other UA documentation pertaining to the Orion on the 11th of October, isn't that correct?

A. I believe that was correct.

Q. Did she provide you when you discussed this 3 October question to her or when you presented her with the question of the time frame of the knowledge of NIS agents pertaining to the 3 October UA, did she identify any other documents such as the one from the Orion that's marked 11 October?

A. No, I didn't ask for any.

CC: We have no further inquiry of this witness, Your Honor.

MJ: Captain.

TC: The government has none, Your Honor.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Agent, to return to the questioning of the accused on 20 October, with regard to the 3 October unauthorized absence, and again, my notes certainly are not verbatim and very, very, fallible; so, please understand that, but my notes indicate that you questioned him about a short period of unauthorized absence and he told you that he had overslept at his girlfriend's house?

A. Yes.

Q. Which unauthorized absence did you inquire of him about?

A. That would have been the one from the 19th, the previous day.

Q. Well, why would you have been concerned about that absence since it was so remote in time?

A. Your Honor, I'm not really sure of the reason for my question at that time.

MJ: Very well, thank you. Any questions based upon that inquiry?

DC: Nothing further, sir.

MJ: Captain Thompson?

[190] EXAMINATION BY THE GOVERNMENT

Questions by the prosecution:

Q. Special Agent Clark, was there a result of interview generated by NIS as a result of the interview of the accused on the 20th of October?

A. I'm sorry, do you mind—

Q. Was there a result of interview report generated by NIS as a result of the interview of Seaman Davis?

A. Yes, there was.

Q. Would you recognize that document? Have you seen it before?

A. Yes, I have. I believe I would recognize it.

TC: What's the next Appellate Exhibit?

MJ: XXVIII, sir.

REPORTER: It would be XXVIII.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XXVIII to the witness.

Q. Do you recognize what it is I just handed you, Special Agent Sentell? [sic]

A. Clark.

TC: Oh, excuse me.

MJ: There is a definite difference.

WITNESS: [Reviewing document.] Yes. This is a results of interview, investigative action, on the interview on the 20th of October with Robert Davis.

Q. Does that document accurately reflect what, if any, information you obtained from Seaman Apprentice Davis? In other words, does it reflect what you talked about with him?

A. Yes, this does accurately reflect the information that was discussed with Davis and our activities on the 20th with Davis.

TC: The record should reflect that I am retrieving Appellate Exhibit XXVIII from the witness and handed it to the military judge.

MJ: Do you have a copy of this, Mr. Savage?

CC: Yes, sir.

[191] TC: The government has nothing further, Your Honor.

MJ: Any other questions of the agent, please?

DC: Just a moment, sir.

MJ: Surely. Well, is the service record book of the accused available?

TC: Yes, Your Honor.

MJ: What is the period of the absence? Is it recorded in the page 13 or a page 7?

TC: I don't believe it's recorded in—it was ever recorded as a page 13 or resulted in a page 7, Your Honor. The only record of it was, to the best of my knowledge, was a counseling entry from the division officer.

MJ: I assume it did not result in any disciplinary action?

TC: That's correct, Your Honor.

MJ: Anything else of the agent, please?

DC: No, sir.

TC: No, Your Honor.

The witness was excused and withdrew from the courtroom.

MJ: Anything further?

DC: Yes, sir.

DC: Captain Thompson, do you have the original medical record?

[Trial counsel delivered the requested record to the defense counsel.]

DC: Sir, could we have about a five or 10 minute recess? We're trying to track down a particular document.

MJ: Certainly you'll have your recess. What is the desires of the counsel with regard to the rest of the day? Do you wish to just—do you wish to conclude this motion or you wish to carry it until tomorrow?

[192] TC: With regard to this motion, the government would propose reserving a ruling on it until tomorrow. There are search and seizure motions that we hope to cover tomorrow, and there will be personnel from the command. One of the major issues seems to be what the perception of the accused was by the command; a suspect in a murder or whatever it might be and that could be cleared up through those same witnesses or clarified.

MJ: In other words, you have not concluded the taking of evidence with regard to this particular motion to suppress?

TC: Yes, sir, in light of Special Agent Clark's testimony.

MJ: Very well, would we be adducing any more evidence this afternoon, counsel?

DC: Sir, if we're going to continue tomorrow it may be better to, in a more organized fashion, track down the paperwork and then introduce it tomorrow morning.

MJ: Very well, anything else we can take up this afternoon, please?

CC: Your Honor, we're ready to move forward on the 4 November—

MJ: Which one was that?

CC: It was a statement taken following the arrest of the accused, Davis.

MJ: Which number?

DC: Just a moment, sir. I think it's—sir, it comes within the umbrella of 20.

TC: Yes, sir. It's part of the general motion to suppress statements under motion 20 was how we were covering the 20 October and 4 November interviews of the accused by NIS.

MJ: Oh, very well.

TC: It's entitled Motion to Suppress Statements, Your Honor.

MJ: Oh, I see, this relates then to a further interview or interrogation?

DC: Yes, sir, I think they'll agree the second was an interrogation.

MJ: Whoever happens to be phrasing the question.

[193] TC: There's probably no dispute on the 4 November one, sir.

MJ: 4 November though, he was clearly a suspect. I think that has been established.

TC: It was a custodial interrogation, sir.

MJ: Oh, that's right. He was in confinement, in fact, that day.

TC: He was confined subsequent to the interview. He had been apprehended.

MJ: My understanding was the portion of the stay at the hospital was enforced in the sense of Miranda/Temptia?

DC: That's the defense position, sir, and that will be raised at a later hearing.

MJ: Very well, sir, fine. What can we do in that regard, sir?

TC: Well, one thing, sir. With regard to the 4 November interrogation, that will require presentation of evidence by the government. There could be some length involved as far as time.

MJ: What do counsel wish to do?

CC: Whatever the court's schedule is suits us, Your Honor.

MJ: Well, I'd like to get these matters heard as quickly as possible.

TC: We have the NIS agents standing by for this purpose; so we should be able to get them.

MJ: Why don't we commence? If we can get something done—unless it encroaches on your schedule, Mr. Savage?

CC: No, that suits us.

MJ: Why don't we start, and then when it seems appropriate we can recess until tomorrow morning. Fair enough?

TC: Yes, sir.

MJ: Why don't you proceed then?

TC: Sir, we'll have to get our NIS agent back again.

[194] MJ: How long will that take? Five minutes?

TC: Yes, sir.

CC: And if she brings her notes with her then perhaps we can save another—

MJ: Would you please have them to bring their notes?

TC: Yes, sir.

The Article 39(a) session recessed at 1652, 15 March 1989.

The Article 39(a) session was called to order at 1715, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. Special Agent Clark has resumed the witness stand.

Keith V. Clark, Naval Investigative Service, was recalled as a witness for the prosecution, reminded of his oath, and testified as follows:

MJ: This is with regard to the motion to suppress the 4 November statement?

CC: Well, I had—I have—

MJ: Oh, I'm sorry.

CC: I have some more questions, if he's back here, on the 20 October, if we could finish that up then we can complete—

MJ: Very well, fine. You want to continue with the motion still pending?

CC: We can complete our—that's all right, Captain?

MJ: Very well, certainly, of course, sir.

CROSS-EXAMINATION

Questions by the civilian counsel:

Q. Now, Agent, you had indicated earlier that you have checked your notes today since your testimony this morning, and in addition to that [195] you have spoken

to your co-agent or with the agent in charge of this case, Sentell, is that correct?

A. That's correct.

Q. And that you have reviewed your notes which indicated that the service member's jacket was received by you, collectively NIS, on 25 October?

A. That's correct.

Q. When in truth, and in fact, a proper review of your notes and your reports would have revealed that you returned the service member's jacket to the command on 25 October, isn't that correct?

A. That's entirely possible that it was returned the same day.

Q. Well, did you check your notes or did you not check your notes?

A. I did not check that information thoroughly. I did see that we had the information on the 25th.

Q. Did you testify under oath today that you did not have possession of the service member's jacket on 20 October?

A. Yes, I testified to—

Q. Did you testify under oath today that you received for the first time the service member's jacket on 25 October?

A. Yes, that's right.

Q. Is that correct? Were you mistaken?

A. To the best of my knowledge that is correct.

Q. Are there notes entitled "Investigative Action, Results of Inquiries/interviews aboard the USS Mahan" with respect to this case?

A. I'm sorry. Would you read the title again?

Q. "United States Naval Investigative Service Investigating Action Results of Inquiries/interviews aboard the USS Mahan." Is there such a document? Let—

CC: If I may approach, Your Honor?

MJ: You may.

CC: May I show you this document and ask if you are familiar with that?

[The witness review the document.]

Q. The question, sir, is very short. Are you familiar with the document?

A. No, I cannot say that I am familiar with this document.

[196] Q. Is that one of the documents you checked today to refresh your memory for purposes of testifying today?

A. No, it is not.

Q. Had you checked that document would that have better refreshed your memory?

A. I haven't read it thoroughly, but since it's pertaining to a 19 October attempt to locate subject aboard the USS Mahan—the title's Robert Davis; it doesn't have an ending. I'm just not familiar with this.

CC: All right. Why don't you just take a minute of your time and read, perhaps, the first paragraph of that document?

[The witness did as directed.]

Q. Have you had sufficient time to read the first paragraph?

A. Not completely.

Q. Let me ask you some specific questions about that document. You say that it is a document that reflects a 19 October inquiry to identify a subject. What does that mean, "subject"?

A. Okay. "Subject" is subject of an investigation. In this case the title reflected as Robert Lee Davis. It is not—the information could have been prepared on the 19th. However, I know that on the 19th this investigation was not titled "Subject: Robert Lee Davis."

Q. May I retrieve the document?

A. Yes [handing document to counsel].

Q. With respect to the document that you have just reviewed. Would it be accurate to say that on 19 October 1988 that you, Special Agent Keith V. Clark, upon arrival at the Mahan you were advised that subject Davis was UA? Is that true?

A. I'm sorry. Did that document state that I arrived on the Mahan?

Q. "An attempt to locate subject aboard the Mahan disclosed that he was UA."

A. I do not believe that I made a trip to the Mahan, and the inquiry, in fact, may have been by the reporting agent of that document.

Q. On 20 October '88 did you go to the Mahan?

A. Yes, I did.

[197] Q. Upon arrival at the Mahan were you advised that the subject returned?

A. I believe that information was obtained before we left to go to the Mahan.

Q. Upon arrival at the Mahan were you "greeted by Lieutenant Commander Maydosz, Executive Officer, Lieutenant (jg) Thomas Moss, subject's division officer, and ICS Kraft"?

A. Yes.

Q. Were you advised that "subject made some remarks that made him question his mental stability and that they were sending him to the medical officer for a psych evaluation"?

A. Yes.

Q. Were you also "advised that Guidry had some information that may be pertinent to the investigation of the death of the sailor"?

A. Yes.

Q. And you have testified previously that you questioned Guidry prior to questioning Davis?

A. That's correct.

Q. Did you receive subject's service record, along with the division officer's counseling records?

A. I don't believe so on the 20th.

Q. Is this document incorrect then?

A. When I read that document it seemed like the date of 25 October was in there, along that sentence.

Q. May I read the document to you?

A. Yes.

Q. "Subject's service record was provided along with the division officer's counseling records. On 25 October '88, when subject's service record was returned, Commander William E. Doud, Commanding Officer of the Mahan, advised the medical officer of the report," etcetera, etcetera. Is that how you read this document?

A. If I could see it again?

[Civilian counsel returned the document to the witness for his review.]

CC: I certainly want to give you adequate but it's a—

WITNESS: Sorry. It seems to be broken, but, yes, the period is there.

[198] Q. Does it say the records were received by you 20 October, and doesn't it further say that the records were returned by you 25 October to the command?

A. No, it does not give a date when the service record was provided along with the division officer's counseling records, and—

Q. I don't mean to quibble with you, but read the statement then.

A. Okay, the statement midway down the first paragraph states as you have read:

Subject's service record was provided along with the division's officer's counseling records. On 25 October

'88, when subject's service record was returned, Commander William E. Doud, the Commanding Officer of the Mahan, advised the medical officer's report on subject indicated subject had an extreme personality disorder.

A. And then there's a continuation of that paragraph.

Q. When does it indicate that the records and the counseling sheets were picked up by NIS? If they were returned on the 25th, when were they obtained?

A. The way this reads, it would tend to indicate that the service records were picked up on the 20th as that's the date that was talked to, to that.

Q. Now, do you have notes, as you showed us this morning, some notes, handwritten notes or whatever, did you keep notes or did Agent Sentell keep notes? Who kept notes?

A. Well, it depends. Sometimes she would keep notes; sometimes I would keep notes.

Q. With respect to 20 October, who kept notes?

A. I believe we both had notes on 20 October.

Q. So, either your notes or her notes would reflect that, would they not?

A. I would think so.

Q. Do you sign any chits or is there any way of documenting when you receive—if you do for instance and pick up somebody's records, do you sign for those?

A. It depends on who we're getting them from and usually a service record, there's some indication if we have to leave the building with it or have to leave the ship with it. I still—

Q. Would there be—

A. I still have no recollection of obtaining the service record on the 20th.

[199] Q.—If the medical personnel on 21 October went to retrieve records, and they were not available, would there be a something in the file that would indicate where they were?

A. Again, I don't know as I don't keep the personnel records.

Q. You don't deny you had the records on the 20th now after refreshing your memory with that document, do you?

A. Well, I'm sorry that I don't really recall picking up the records on the 20th.

Q. That's not what I asked you, sir. Do you deny having the records on the 20th?

A. I do not have any knowledge of having the records on the 20th. I don't deny that—whether or not I actually had them because I have no recall—

Q. You don't deny that the official records of NIS indicates that you had them on the 20th?

A. I believe that's a little unclear because there was not a date sentence, not to split hairs.

CC: May I retrieve the document, Your Honor?

MJ: Certainly.

CC: Could I have one or two more questions, Your Honor?

MJ: Certainly.

Q. Agent, do you contest then that the—about who you spoke to that day—I mean, do you agree that the document is correct, that you spoke to Lieutenant (jg) Moss and Lieutenant Commander—the Executive Officer, whoever he may be?

A. Yes, I certainly did.

Q. And you don't deny that they told you that they were concerned about Davis?

A. No, I do not deny that.

Q. And you knew, of course, that Agent Sentell's husband was the head of psychiatry at the Naval Hospital. You don't deny that, do you?

A. No, I knew that he was a psychiatrist there.

[200] Q. Would you mind pointing out to the court the part of this statement that gives you any reservation with regard to your receipt of the records on 20 October?

A. I'm not refuting that the document is correct. I'm just stating that I don't have recall of having obtained the records and carried them off the ship back to the office. I just don't have that recall.

TC: Your Honor, at this point, the government would have to object on the competence of the witness. He said he doesn't have any recall, so there seems to be a lack of personal knowledge.

MJ: Very well, I believe Mr. Savage has completed his examination.

[Defense counsel conferred.]

Q. Do you ever recall seeing any counseling records with respect to that subject, now accused, Davis?

A. I do recall obtaining some records from the Naval Hospital. As far as having personal knowledge of actually reviewing them in detail, I don't believe I did.

Q. Well, then what would the statement, "Subject's service record was provided along with the Division Officer's counseling records," what would that indicate in this NIS report?

A. That would indicate that the records were provided and that NIS did have possession of the personnel records, and the counseling records.

CC: May I approach, Your Honor?

MJ: Certainly.

Q. The document I just provided to you, are you familiar with that document or can you tell us what that document purports to be?

A. Yes. The top part of this document is the Privacy Act Statement and then a line and key counseling points, and then there's an entry of Robert Davis, grade, social security number, and where's he attached and who the counselor was; it was Lieutenant (jg) Moss.

Q. Does it have a date?

A. [No response.]

Q. The upper right hand corner.

A. I'm sorry, okay, yes, it does. It's 3 October '88.

Q. And realizing that's, at best, a poor copy, if you could, read for us the top line at the bottom of the page under resume of reasons [201] which cause—to counseling requirements, give details, facts, dates, names, whatever else.

A. It has on the first line under that, "UA from 0700, 3 October '88 to 1400" and it looks like "3 October," again.

Q. Again, on 20 October, you were aware that the body was found—the body of the deceased was found on 3 October.

A. That's correct.

Q. And that any unauthorized absence would have been targets of your inquiry.

A. Sure.

Q. And previous inquiries have been made of other commands.

A. Yes.

Q. And that document that you have in your hand would be extremely pertinent to your investigation.

A. It would be pertinent, yes.

Q. And, in fact, it was so pertinent that it was provided to you on 20 October by, is it, Lieutenant (jg) Moss?

A. Okay, again, it was provided and if this document—if it was on the 20th, I'm sure that that is the case.

Q. And if you were provided with that document, certainly, it would have drawn your attention. I mean, you wouldn't have ignored that he was UA on 3 October.

A. It would have only interested me after knowledge of it. Just because I picked up the record doesn't mean I reviewed it that date.

Q. Well, when do your notes indicate that you reviewed that record?

A. Okay, I do not have notes that indicate that I personally did review that record.

CC: Beg the court's indulgence one moment.

[Defense counsel conferred.]

CC: Your Honor, do we then offer—what I want to do is offer both these documents for the—do we offer them separately?

MJ: Yes, certainly. I think it would be easier to identify.

CC: May I approach? Your Honor, we would ask that the court have an opportunity to review those documents in case the court would like further inquiry of this witness. [202] MJ: That is XXIX and XXX.

REPORTER: Yes, sir. That would be Appellate Exhibits XXIX and XXX.

MJ: Any further examination, Mr. Savage?

CC: No, sir.

MJ: Captain, do you have any examination of the witness?

TC: Your Honor, with regard to the exhibits offered by the government, rather by the defense, the government would ask for clarification of which exhibit is which as far as numbers.

REPORTER: XXX is the results of inquiries/interviews, 19 October, and—I'm sorry, XXIX is that one. XXX is the key counseling points.

TC: The government requests the number of pages in Appellate Exhibit XXIX.

REPORTER: XXIX has one page.

TC: Your Honor, the government would object to XXIX under Military Rule of Evidence 106 and request that the entire document which is—make it into a three page document.

MJ: Well, you can always—

CC: We'd be glad to see it. I've never seen any additional information with respect to this.

MJ: You can take a look at it, and if it needs to be augmented, Captain, certainly, we'll be prepared to do so. [Defense counsel examined the document.]

CC: I don't have any objection to that, Your Honor.

MJ: Very well.

CC: Of course, the relevance is up to 20 October.

MJ: What do the other two pages add?

TC: The other two pages, there's been great emphasis on the fact that the accused in this case is referred to as "subject," and what the other two pages tell you, the last page tells you, that the document was prepared on the 4th of December, typed on the 4th of December and it was done by Agent Sentell.

[203] MJ: Very well, fine. Thank you.

MJ: Do you have any objection of the agent, please, Captain?

TC: Yes, sir, if I may use Appellate Exhibit XXIX to do so.

MJ: Certainly, please, proceed.

TC: The record should reflect that I have handed what's been marked as Appellate Exhibit XXIX to the witness.

DIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Clark, there's been reference to the use of the terminology "subject" in reference to Seaman Apprentice Davis. Does that reference, "subject," does that reflect the status of Seaman Apprentice Davis on the 19th of October or does it reflect the status of Seaman Apprentice Davis when that document was prepared?

A. It reflects the status of Seaman Apprentice Davis on the date that the document was prepared, and that on was 4 December '88.

Q. Seaman Apprentice Davis was the subject of the case, the investigation, on the 4th of December?

A. On 4 December, yes.

Q. And you testified earlier as to when he became the subject of the investigation approximately. Do you remember when that was?

A. Approximately — this was around the time frame of 1 November, the first of November.

Q. Around the first part of November?

A. Yes, prior to that —

Q. Prior to the preparation of this document, but subsequent to the 20th of October?

A. Yes. Correct.

Q. Does that document reflect the title of the case investigation?

A. Yes, it does.

Q. And what is that title?

A. The title is "S," which stands for subject, /Davis, Robert Lee/OSSN/U.S. Navy.

[204] Q. To the best of your knowledge, did this investigation concerning Seaman Shackleton's death, did it always have the same title?

A. No, it did not. We carried it under the victim title with Shackleton's name up until the time that Davis was considered a suspect.

Q. So after the time — after Seaman Davis became a suspect around the 1st of November, the title of the case investigation was changed.

A. That's correct. Davis was added in the subject line.

Q. And the subject — and the victim was deleted?

A. The victim is stated in the full title but it's a victim line underneath the subject line.

TC: The record should reflect that I am retrieving Appellate Exhibit XXIX and return it to the court reporter. The government has no further questions, Your Honor.

MJ: Any further examination of the agent, please?

CC: Nothing further, Your Honor.

There being no further questions, the witness was excused and withdrew from the courtroom.

MJ: I would think that it probably might be appropriate to secure for the evening rather than try to commence taking in evidence on other motions. Is that agreeable with counsel?

TC: Yes, sir.

DC: Sir, we have no further evidence to present on this particular motion and are prepared for argument, if you would like to entertain that now.

MJ: We've been going at this pretty heavy, why don't we secure until tomorrow morning. Is that going to present any problems to counsel?

DC: At your pleasure, sir.

TC: No, sir. One thing the court would note is that with regard to one of the search and seizure motions, the government intends to call the Commanding Officer of the USS Mahan, and, because of his role, we've got a certain window that we need to put him in as far as his testimony,

if we can. We've made arrangements to have him testify around 10:00 o'clock morning if we could.

MJ: I'm sure that regardless of what we're doing, we can accommodate the Commanding Officer.

[205] TC: The government has nothing further then.

MJ: Very well, we will adjourn until 0845. Is that convenient or make it earlier or later?

DC: At your pleasure, sir.

MJ: 0845. Thank you very much.

The Article 39(a) session recessed at 1740, 15 March 1989.

* * * * *

[264] MJ: Anything further, please, counsel? Captain?

DC: Sir, in light of the factors as stated in *Tibbets*, we would like to offer, if we could, one further Appellate Exhibit which are the notes of Special Agents Sentell and Clark of the interview of 20 October for your consideration, sir. That would be what Appellate Exhibit?

REPORTER: XXXVI.

DC: I'd offer it to the court at this time, sir.

MJ: Very well, thank you.

MJ: Very well, the military judge makes the following findings of fact:

That the accused, Seaman Davis, was among a group of servicemembers who were at the Enlisted Mens' Club on 2 October 1988, played pool, owned his own pool cue, and left the club at closing;

That Seaman Shackleton's body found at about 0500, 3 October 1988;

That the accused was an unauthorized absentee from 0700 to 1400 on 3 October 1988 and that upon discussion with his Division Officer, the offense was handled administratively;

That Naval Investigative Service was aware that a pool cue was likely the instrument which caused Seaman Shackleton's death;

That the accused was in a status of restriction and under escort when he was called for questioning by the Naval Investigative Service;

That the agents on 20 October 1988 did not consider him to be a suspect;

That the agents were aware of what the accused had purportedly told Guidry and that he had heard that Seaman Shackleton had been hit and jabbed;

That Fire Controlman Second Class Smith, duty master-at-arms, told the agents the accused told him that he didn't kill Seaman Shackleton but he knew who had killed him;

That various rumors were rife concerning the death of Seaman Shackleton;

[265] That the dynamics and specifics of the injuries suffered by Shackleton were closely held;

That some members of the USS Mahan, including the Executive Officer, believed the accused was a suspect;

That after learning of the statements attributed to the accused, the agents continued to treat the accused as a potential witness vice a suspect;

That consistent thereto a verbal consent to seize his cue sticks was obtained rather than the execution of the more formal document;

That the agents' actions were consistent with their approach as to the accused's status;

That the accused told the agents he was at the Enlisted Mens' Club, shot pool and related his activities after he left the club and identified a certain Albertha Lynn Heffner as a person he was with;

That he told the Naval Investigative Service agents he heard about Seaman Shackleton's death about three days after it occurred and that Wade Bielby and Bonnie Krusen told him he was killed with a pool cue;

That he told the agents he had two cues at Ms. Heffner's residence;

That he consented to the seizure and participated in the recovery of those cue sticks;

That following the interview with the accused, the pace or focus of the investigation did not dramatically change, rather the Naval Investigative Service continued the investigation including following the leads provided by the accused which proved, apparently, unproductive;

That the agents, after questioning of the accused, subjectively did not consider the accused a suspect;

That the recovery of the cue sticks were a direct result of the 20 October 1988 interview.

MJ: The investigation concerning the death of Seaman Shackleton started with little more than the body discovered at 0500, 3 October 1988. As the investigation developed, it narrowed with medical evidence and opinion and the elimination of various of possibilities. The most likely instrument of the fatal injuries was a pool cue and the Naval Investigative Service undertook to identify those persons who used the Enlisted Mens' Club and had personal cue sticks.

[266] MJ: When Special Agents Sentell and Clark came on board Mahan on 20 October 1988 to question the accused, he had returned from a short period of unauthorized absence. They became aware of that particular absence, his restriction and his statements to Guidry and Smith. They also knew of the statements to his Division Officer and the command's intention to seek a neuropsychiatric evaluation. They questioned him without warnings and, from the testimony and exhibits, the accused provided explanation of his whereabouts after 0030, 3 October 1988 and his knowledge of the death of Seaman Shackleton. Determination as to the agents as to whether the accused was a suspect as of 20 October were testified to by them and is supported by the conduct of the questioning.

Moreover, the routine reaction of the agents following the questioning is also consistent with their testimony that they did not consider the accused a suspect until on or about 1 November. Such subjective assessment must be given due consideration but the test is were the facts which were known of such a nature that a reasonable person would have suspected the subject.

With regard to the short period of unauthorized absence, while the investigators were seeking information as to unauthorized absences as of 3 October, such information would only be relevant if it suggested something such as flight by the perpetrator. In this instance, the fact of a short unauthorized absence which would only tend to draw attention to an individual who could have obviously been at quarters at 0700 would tend to suggest a contrary inference.

The circumstances of the statements of the accused to Guidry and Smith indicated to the agents that the accused may have had intimate information. Full statements included the clear disclaimer of guilt by the accused. The

statement to Smith was made while the accused was awaiting questioning and he was, according to Smith, extremely nervous and talkative and related that he would tell who it was if he was going to be blamed. According to Petty Officer Smith, the accused said the person knew martial arts. The agents' evaluation of these statements must be weighed in light of the accused's outburst to his Division Officer that he wanted to kill cops because they would kill him, that he wanted to shoot cops because they would kill him.

From the totality of the situation, it would have been reasonable for the agents to have discounted the inherent value and efficacy of all the accused's statements and to have proceeded to determine what he actually knew and continue with their investigation. Had they done otherwise, they would have had their only identified suspect almost immediately taken to the Squadron Medical Officer, given a neuropsychiatric evaluation and, later, admitted to the psychiatric ward at the Naval Hospital Charleston.

[267] MJ: With all the circumstances, the military judge finds that the accused was not a suspect on 20 October and no Article 31 UCMJ warning was required. Accordingly, the motion to suppress is denied.

MJ: Very well, are you ready to proceed, counsel?

TC: Yes, Your Honor. Your Honor, we presented the evidence on the—regarding the search and seizure on 1 November with regard to the locker on the ship.

MJ: I thought there was still evidence to be taken in that regard. That is why I did not address it, and, of course, I did not entertain argument in that regard.

TC: The government intends to present no further evidence, and we have no preference as to argument. We could argue it now for the sake of convenience or later.

MJ: Your desires, gentlemen?

CC: We have nothing further to present on that. We thought that was closed as well.

MJ: I'm sorry, Mr. Savage.

CC: I thought that we had finished that as well.

MJ: Of course, there had been no specific argument on that, and that's why I didn't think that it had been concluded with regard to presentations.

DC: We can argue now or we can argue at the conclusion of the next motion, sir, whatever your pleasure is.

MJ: The next motion would be?

TC: We have additional witnesses concerning, I believe, it's motion 20, sir, and that's the general motion, sir, with regard to the statements and these witnesses are additional personnel to whom Seaman Apprentice Davis had made admissions to.

MJ: Oh, these were purported statements at the hospital, is that correct?

TC: No, sir, these were other admissions on board the Mahan or personnel, shipmates, of the accused that haven't been addressed previously.

* * * * *

[294] Jeanmarie Sentell, Civilian, was recalled as a witness for the prosecution, was reminded of her oath, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Ma'am, earlier you testified concerning an interview of the accused on the 20th of November—excuse me, the 20th of October 1988. Subsequent to that did you have any other occasion to talk to Seaman Apprentice Davis?

A. Yes.

Q. When was that?

A. On the 4th of November 1988.

Q. On the 4th of November 1988 what was—earlier you had testified that he was considered a witness back on the 20th of October. [295] What was—did you consider his status as of the 4th of November?

A. At this point in time, we suspected him in the investigation into the murder of Keith Shackleton.

Q. Where—you said you talked to him, where did you talk to him at?

A. At the Naval Investigative Service Office.

Q. And what were the circumstances of that? For example, had he been apprehended or did you call him in?

A. He had been apprehended by some other agents that brought him to my office.

Q. So, the interview took place at NIS headquarters or the NIS office on board base?

A. Yes.

Q. Where within that NIS office did the discussion take place?

A. One of the middle offices, interview room.

Q. Could you describe that room?

A. The room has got a desk in it, some file cabinets, three or four chairs in it, a sink in it.

Q. Who was present during the interview of the accused?

A. Just Keith Clark and myself.

Q. Do you remember about what time the interview began?

A. At approximately 1630.

Q. Could you give us the sequence of events. What happened when you first brought Seaman Apprentice Davis into the room?

A. I read him his rights. What we did was we completed a form that's called the "Military Suspects

Acknowledgement and Waiver of Rights Form." I identified myself and Special Agent Clark identified himself, and we informed him that he was suspected of the homicide of Keith Shackleton, and then we proceeded—I proceeded to read him his rights straight from the form. At that point in time, after I completed reading his rights, I asked him if he understood his rights as they were read to him. He said yes. I asked him if he wished to consult to a lawyer—with a lawyer prior to any questioning, and he said no. I then gave him the waiver of rights form, asked him to please read it, to let me know if there was anything that he did not understand; a word that he didn't understand or if there was any part of his rights that he did not understand, and after he read the form, I asked if he had any questions, and he replied no. Any questions about the form or about his rights, and he said no, and I asked him if he would answer some questions about the allegations, and he said yes, [296] because he didn't kill anyone, and then he signed the form. Then Keith and myself signed the form.

TC: What's the next appellate exhibit in order?

REPORTER: XXXVII.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XXXVII to the witness.

Q. Ma'am, do you recognize what it is I just handed to you?

A. [Examining exhibit.] Yes, I do. This is the Military Rights/Suspect's Acknowledgement and Waiver of Rights form that I just spoke about.

Q. Do any signatures appear on that form?

A. Yes.

Q. And whose signatures are there?

A. • Robert Lee Davis, my own, and Keith Clark.

Q. And is that the form you used on the 4th of November?

A. Yes, it's a copy of it.

Q. After executing this form did you interview Seaman Apprentice Davis at all?

A. Yes.

Q. Did he talk to you freely?

A. Yes.

Q. Prior to interviewing him, did you make it clear that if he wanted to terminate the interview that he could at any time?

A. Yes, that's right in the waiver of rights.

Q. What was Seaman Apprentice Davis' condition? Did he appear to be sober, for example?

A. Yes, he did.

Q. Prior to interviewing him was he threatened in any way?

A. Not to my knowledge, no.

Q. What about during the interview?

A. No.

Q. How long did the interview last, approximately?

A. Approximately two and a half hours.

[297] Q. Did you have any breaks at all during that period of time?

A. Yes, we did. About an hour and a half into the interview or interrogation, whichever way you want to look at it, we had about a seven minute break.

Q. What was the purpose of that?

A. To see if he wanted a drink. I believe he wanted his chewing tobacco, his Copenhagen.

Q. Those items were offered to him?

A. Yes.

Q. How did the interview eventually end?

A. He asked for a lawyer.

Q. And did all the questioning stop at that point?

A. Oh, yes. Right then.

Q. Did Seaman Apprentice Davis make a written statement?

A. No, he did not.

Q. Did you ask him to make a written statement after he had asked for a lawyer?

A. No.

TC: The government has no further questions.

MJ: Gentlemen, do you have questions of the agent, please?

CROSS-EXAMINATION

Questions by the defense (Mr. Savage):

Q. Did you bring your notes?

A. Yes, I did.

Q. May I see them, please?

A. Yes [handing document to civilian counsel].

Q. Within the confines of the NIS office here in Charleston, do you have any equipment that would lend itself to a video or an audio record of interrogations of suspects?

A. Do we have access or do we have it rigged up in the—

Q. Do you have access to video or audio equipment?

A. We have access to, yes.

[298] Q. And on the 4th day of November did you use the equipment in your custody to record either in a video fashion or an audio fashion the conversation or the interrogation or the interview with Mr. Davis?

A. No, we did not.

Q. At the time you commenced that interrogation you knew that this was a murder case?

A. Homicide, yes.

Q. And you knew this was the most important case that you, Agent Sentell, had ever been involved with, isn't that correct?

A. Correct.

Q. And the equipment was available?

A. If we wanted it, yes, I'm sure it was available.

Q. And if that equipment had been utilized we would have a complete record of what went on in that room that day, isn't that correct?

A. That would be correct.

Q. And you chose not to do that?

A. We chose not to use video or any kind of equipment.

Q. Why was that?

A. It was our decision not to do such a thing. It was not a common practice.

Q. Well, this isn't a common case is it?

A. No.

Q. What's the basis of your decision not to use equipment that was available to record that interview?

A. We don't do it normally.

Q. It wasn't important?

A. I wouldn't even say that it was a consideration. It was not that it was important or not.

Q. Now, with respect to your experience as a NIS agent, you have on a number of occasions utilized interview techniques with suspects, isn't that correct? You've interviewed a number of suspects before, correct?

A. Yes, I have.

Q. And you know about Article 31 rights?

A. Yes.

[299] Q. And does the NIS have forms—for instance, earlier today you indicated that you have a form for a waiver of search. NIS has a waiver of search form, correct?

A. A permissive search authorization?

Q. Permissive search, right.

A. Yes.

Q. And you didn't utilize that?

A. No, we did not.

Q. Does the NIS have a waiver of rights form?

A. Yes.

Q. Does it have more than one form?

A. We've got a civilian waiver of rights form.

Q. Do you have a copy of that with you?

A. No, I don't.

Q. Would you kindly make one available to me so that I can review it some time between now and tomorrow?

A. Sure.

Q. Is the material contained in the civilian waiver of rights form the same as the military waiver of rights form?

A. No, it's slightly different, and it's pretty much obsolete at this point. For a couple of years it's been obsolete.

Q. What makes it obsolete?

A. The civilian suspect's acknowledgement of rights. We haven't used—

Q. Well, is the civilian an acknowledgement of rights form or a waiver of rights form?

A. Acknowledgement and waiver of rights form.

Q. That's the civilian one?

A. So is the military one.

Q. And I'd like to hand you a document and ask you if you can identify this as the form that the NIS uses for acknowledgement of rights [handing document to witness]? That document which you have is a reproduction of Appellate Exhibit XXXVII, is that correct?

A. [Examining document.] Yes, it is.

Q. May I retrieve that?

A. Yes [handing document to counsel].

[300] Q. You're familiar with this form?

A. I—

Q. Not this particular form, but the form of the form?

A. Yes, I am.

Q. And it is a fairly accurate form in terms of the rights that one is entitled to, isn't that correct?

A. Correct.

Q. Now, how does somebody on this form indicate waiver of their rights? Where do they sign to indicate that they waived their rights?

A. It says—there's a paragraph right here; it says "I understand my rights as related to me and set forth above. With that understanding, I have decided I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily." Okay, this is the waiver of rights.

Q. Okay. Now, and that is the signature that Robert Lee Davis signed in the signature blank below that, correct?

A. Yes, it is.

Q. Which would indicate that he waived his rights?

A. Correct.

Q. Now, where on this form would he sign to invoke his rights?

A. If he told us that he did not wish to talk to us, then we would stop right then and there and he would not have to sign this form, and neither would we.

Q. Well, where would there be a record of him invoking his rights in the NIS file? If he invoked his rights and said he did not want to waive them, where would he sign the document?

A. He wouldn't need to sign the document. By not signing the document means that he wishes to remain silent. Okay, this is the way that we utilize the form. Okay?

Q. On this form it says "At this time I desire to make the following voluntary statement" and it says date and time?

A. Okay.

Q. Why, if you now offer a statement that he made, why wasn't this form completed that at a particular date and time he, Davis, initiated a voluntary statement?

A. Okay. Whenever we take a written statement from somebody that has been apprised of their rights, we've talked to them about the matter and they said that they would like to give a written statement or they will give a written statement, the written statement commences [301] on this front page of the form. We start off the whole statement on this form, and then we proceed on another piece of paper, should it take longer which is normal, but this is only after the person has agreed to provide a voluntary, written statement.

Q. So it's fair to say that the only possible documentation that NIS would have is somebody who waives their rights?

A. I beg your pardon?

Q. Well, if somebody invoked their rights, there's be no record of it any place. If they waive their rights and give a verbal statement, there's one signature block.

A. Correct.

Q. If they waive their rights and give two statements, one verbal and one written, there's another signature block.

A. Correct, and that's why we do a results of interview.

Q. Well, do you think that that form then is geared to have somebody invoke their rights?

A. I don't understand.

Q. Do you have another form that says I invoke my rights?

A. No, we don't.

Q. There is no form for that at all?

A. No, no.

Q. Now, do you have the originals of the forms that were used?

A. Yes. They are back at my office, the original.

Q. I notice that the times on the forms on the copies that I have have been changed. May I assume that the original times were changed on the original form as well?

A. Which one are you talking about?

Q. The arrival, the time entered the room, the time the suspect waives the rights, the times that a rest period was taken.

TC: Excuse me, sir. Appellate Exhibit XXXVII consists of just the waiver of rights form. The document you have there is probably the interrogation log, and that —

CC: I apologize. Let me — may I approach?

MJ: Of course, you may.

Q. Are you familiar with this document, Agent Sentell?

A. Yes.

[302] Q. Is that part of what you have there with you or is that the only copy you have?

A. This is the only copy that's here. I have the original back in my office.

Q. That's referenced as the document you have, and we will mark that as Appellate Exhibit —

REPORTER: Yes, sir.

Q. That is a log which is kept by an interviewing agent?

A. Yes.

Q. And as I said, the times all seem to be changed on there.

A. Okay, may I explain that to you.

Q. That's what I was going to ask you to do.

A. Okay. He came in at 4:28 regular time. I made the error. It is 1628 military time. I was trying to keep it in military time, and it was my error, that it was not 4:28 p.m., it was 1628 hours. Do you understand what I was trying to do here, that I was trying to keep it in military time and I slipped back to regular time, and that's why I initialed it; that's why I had the third error down, I initialed it and also Mr. Clark who was present initialed it because they were mistakes made in converting from regular time to military time.

Q. All right, and that would only affect the first two digits, would that be correct?

A. The third digit also because I looked at my watch, and I thought it was 18 and it was not or 16 and it was not.

Q. But that would only affect the first two digits in the military time as opposed to civilian time, isn't that correct?

A. Correct.

Q. All right, now, what time did Mr. Davis get out of the hospital, do you know?

A. I'm not positive. I believe it was around 4 o'clock, but I was not there so I don't know.

Q. All right, you sent other agents to pick him up. Did they pick him up at the hospital?

A. Yes. Mr. Clark and, I believe, two other agents.

Q. And he was brought from the hospital to NIS headquarters?

A. To our office, not the headquarters but the resident agency.

[303] Q. But where you work?

A. Yeah.

Q. And you advised him of his rights and he said he'd go ahead and make a statement

A. Yes.

Q. And you took a break, according to your log, at 1757. I have an almost illegible copy. Is that what that copy reflects?

A. Yes.

Q. And when did that break end?

A. At 1805.

Q. And does the rest break indicate to you that there was a mistake made on that time as well?

A. Yes.

Q. And what was the mistake that was made that time?

A. Five, it should have been a 17.

Q. Originally, it was 5:57, you changed it to 1757.

A. 17, yes.

Q. And when did the break end?

A. At 1805.

Q. And my copy appears to be 1808.

A. No, it's 1805.

Q. All right, was that changed later on?

A. No, it was changed right then and there. I looked at my watch and I started writing, and then I looked at my watch, it was 1805.

Q. Does your copy say 1808 or 1805?

A. 1805.

Q. So, if I'm reading the 1808, that's my misreading of the document, correct?

A. Well, it's because I had a problem with 1804-1805. Started out as 1804, I looked at my clock, it was 1805.

Q. Why was the rest break initiated at 1757?

A. It was just a matter of asking him if he wanted a soda or something to take a breather.

[304] Q. And how does that reference to the time during the interview that he made a comment that he wanted to lawyer?

A. He made that comment just before the break. After we resolved that issue, we continued on with the interview for a few more minutes.

Q. Well, in your report of investigation, it indicates that "at 1743, subject made a comment that, maybe he should talk to a lawyer, and all questioning stopped." What took place between 1743 and 1757?

A. We talked a little bit longer.

Q. Well, I thought the questioning stopped?

A. After—I beg your pardon.

Q. At 17—I'm reading from your notes now. "At 1743, subject made a comment that maybe he should talk to lawyer. All questioning stopped." Now, is it—are we correct, do you have a copy of the NIS report?

A. Yes, I do.

Q. I'm referring to, I guess, page 2 of a three page report, is that correct?

A. Correct.

Q. Full paragraph, the first full paragraph, that's actually the second paragraph on the page, it says "at 1743, subject made a comment that, maybe he should talk to a lawyer." Is that correct?

A. Yes.

Q. All right, the time is correct and the content of the statement is correct.

A. When I reviewed and compared it to my notes, I noticed that there was a typographical error, it was 1753.

Q. So, when he made this comment about asking for a lawyer, it was not at 1743, your notes reflect it was at 1753.

A. My notes reflect 1753, but there's a typographical error on this report.

Q. When did you first notice that?

A. When I was reviewing my notes yesterday, I believe.

Q. And with respect, again, to the break that was taken, that was taken at 1757.

A. Correct.

Q. And the break then right after he asked you to speak to a lawyer, four minutes by your log.

A. Correct.

Q. Following the break, did you readvise him of his rights?

[305] A. We verbally said you understand that you're still—this is—I've forgotten the wording that we used but it was basically, you understand your rights are still in effect, something to those words. I don't recall my exact words.

Q. Did you fill out another waiver of rights form?

A. No, because it was not a long period of time. In fact, I don't think we're even required because it was only a few minutes break.

Q. But you did do it nonetheless? I mean, you thought it was important enough in this particular case to do it.

A. In this particular case, it was still letting him know that, hey, your rights are still—

Q. Was that documented on the log form?

A. No.

Q. Was it documented on your notes?

A. No.

Q. And you continued his questioning at that time.

A. Yes.

Q. The information regarding that was provided to you by Mr. Davis regarding his T-shirt—

A. Yes.

Q. Was that done before the break?

A. It appears in the sequence on this. If you want to compare it to my notes—

Q. Well, I don't know. I wasn't there. I'm asking you when it was provided.

A. Yes, it was before.

Q. And did he advise you of the source of the blood that was on his T-shirt?

A. Yes, he said it was from his wisdom teeth.

Q. And did you confirm that?

A. Yes, we did.

Q. When was that done?

A. I could not give you an exact date.

Q. Well, was it done before or after you questioned him about it?

A. It was right afterwards.

[306] Q. Did you know that there was blood on a pillow and a sheet in his bunk before you interviewed him on 4 November?

A. I don't recall.

Q. Well, wouldn't the blood on a sheet and pillow be pretty important—

A. I don't want to get out of time sequence again like I did before. I would have to refresh my notes on that to be absolutely certain.

Q. Well, I am referring to your notes dated 4 November, page 2. "Re. T-shirt, wisdom teeth removed Tuesday, 25 October, teeth, gums draining, had towels with blood, threw them out, gagged on gauze, threw out, blood should still be on pillow and bed sheets."

A. I know that we've obtained the bed sheets but I can't give you an exact date.

Q. Do you know whether or not prior to your interviewing Mr. Davis at the NIS office, headquarters, whatever, the 4 November date, whether or not he was advised of his Article 31 rights before he got there?

A. No, I don't.

Q. Do you know whether he was advised of his rights at the hospital?

A. No, I don't. Direct knowledge of it, no. Mr. Clark told me he gave the rights.

Q. Do you know whether any hospital personnel advised him of his rights?

A. Specifically, no, I do not know.

Q. Specifically your husband?

A. I don't know.

Q. Specifically you have an affidavit in your case file from your husband, isn't that correct?

A. If it's in the medical record, I would have to look at it.

Q. You're not aware of an affidavit signed by your husband with respect to his involvement in this case?

A. The statement that he provided?

Q. An affidavit that he provided.

A. An affidavit? In the medical? I know that he has provided something, a statement, yes.

Q. You were the case agent in charge of this case when he provided it, weren't you?

A. I was confused with your time as far as in the hospital.

[307] Q. My question is: do you know whether or not his Article 31 rights were presented to him in the hospital, Davis.

A. I don't recall.

Q. Now, Davis was taken from the hospital to NIS, correct?

A. Yes, he was.

Q. What efforts were made, either by you or any other agents at NIS, to obtain a lawyer for him?

A. None to my knowledge.

Q. Well, you said at one point, at 1753, he requested counsel, and you, apparently, talked him out of it at that time. You took a rest break, you calmed him down, and he

decided he didn't want a lawyer at that time, isn't that correct?

A. No, it's not correct.

Q. Isn't that what your notes reflect?

A. [No audible response.]

Q. I mean, he asked for a lawyer.

A. Yes.

Q. At 1743 or 1753, and all questioning stopped. Was any attempt made at that time to obtain a lawyer for him?

A. No, we clarified the situation. He did not want a lawyer.

Q. When you say, "we," are you referring to Clark and Sentell?

A. Correct.

Q. At what time did he tell you again that he wanted a lawyer?

A. At 1857.

Q. And what efforts were made at that time to obtain a lawyer for him?

A. We called the ship and we said that he has asked for a lawyer and to, please, do what needs to be done. We, personally, did not contact a lawyer. We advised the ship that he has requested a lawyer and to make it happen.

CC: Beg the court's indulgence for one minute.

MJ: Certainly.

[Defense counsel conferred.]

Q. In previous cases that you've had on base here at Charleston [308] Naval Station, have you initiated phone calls to legal services to see if a lawyer was available?

A. No, I have not.

Q. You've never done that?

A. No.

Q. Has anybody working with you ever done that?

A. I have no knowledge.

Q. Have you ever directed a suspect to go to legal services?

A. I don't know. I don't recall.

Q. With respect — I know you told us earlier there was a sink and all in the room. When Davis was brought over there, was he shackled, as he was transported to court now? Did he have leg irons on and handcuffs?

A. He had handcuffs on.

Q. No leg irons?

A. Not that I recall.

Q. When he was in the office —

A. Yes.

Q. —was he in custody in some sort of—in fixed custody with restraints?

A. Yes, he did. He had handcuffs on one arm and he was handcuffed to the chair that he was seated at.

Q. While you were interviewing him is what I'm talking about now, not during a break or something, but when you were interrogating him, how was he restrained?

A. That is the manner in which he was restrained.

Q. He was handcuffed to the chair he was sitting in?

A. Yes.

CC: That's all we have, Your Honor. Thank you.

MJ: Captain.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Sentell, there's mention of the fact that you didn't record either audio-wise or visually the interrogation of the [309] accused on the 4th of November. Is it the practice of NIS to do that?

A. Not on a normal basis at all.

Q. Have you ever done that?

A. On a witness, yes, I have one time.

Q. What about a suspect?

A. Never on a suspect that I recall.

Q. With regards to the rights form, does a suspect or someone being interviewed by NIS, do they have to do something? Do they have to take some sort of action in order to waive their rights? Does it require them to do an affirmative act?

A. Yes, they have to sign the form. Sign and date it and give the time.

Q. And that creates a record?

A. Correct.

Q. If someone asks for a lawyer, when you go to interview them, what's the practical result of that?

A. We don't question them any further or we don't question them at all. If it's at the beginning of an interview and they say I want to talk to a lawyer first, fine, no problem.

Q. So, from your experience if you went—if the individual went and talked to a lawyer, what do you think the chances are of him speaking further to NIS?

A. Chances are pretty slim.

Q. So, is it general practice just to forget the interview if the individual wants a lawyer?

A. Normally, yes, unless they come back with their lawyer or say that they've decided to talk to us.

Q. Regarding 1753 when the accused made mention of a lawyer. You can refresh your recollection from your notes if you desire. Did Seaman Apprentice Davis say, "I want a lawyer," or was it remarked about a lawyer or what?

A. It was strictly a remark about a lawyer.

Q. What was the remark?

A. He said, "Maybe I should talk to a lawyer."

Q. And at that point, did the questioning cease?

A. Yes.

[310] Q. Did you do anything to clarify?

A. Yes. Made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

Q. So, as you were clarifying whether or not he wanted a lawyer, the accused specifically said that he did not, correct?

A. Correct.

Q. And then he went on and he initiated further conversation beyond that?

A. Yes, he did.

Q. Did you do a background check on Seaman Apprentice Davis as far as his criminal record?

A. Yes, we did.

Q. Did that reveal anything as far as a record?

A. Yes.

Q. Something extensive or?

A. We have a few records on him, yes.

Q. Was he ever convicted of a crime?

A. Larceny.

Q. Do you know if he was sentenced to jail because of that?

A. Six months in jail, I believe.

Q. Now, at approximately 1853 when Seaman Apprentice Davis asked for a lawyer at that time, correct?

A. I beg your pardon?

Q. At approximately 1853 —

A. 1857.

Q. 1857.

A. Yes.

Q. He asked for a lawyer?

A. He said, "I think I want a lawyer before I say anything else."

Q. The questioning stopped?

A. Immediately.

[311] Q. Any questioning before that?

A. Beg your pardon?

Q. Was there any — I mean after that, after he made —

A. No, absolutely not.

Q. Was that the end of the interview?

A. That was the end of the interview, and we called the ship.

Q. You'd gone over that rights advisement and the waiver form prior to this. Prior to him executing that form, prior to being advised of his rights and waiving them, was he questioned in any way prior to that?

A. No. According to what was relayed to me by Special Agent Clark, no questions were asked of him.

Q. No questions were asked while he was at NIS in the office?

A. No.

TC: The government has no further questions.

MJ: Recross, counselor?

CC: Beg the court's indulgence?

MJ: Certainly.

[Defense counsel conferred.]

CC: Your Honor, may we request that the witness obtain the original log from this interview so we can — our Xerox copy is, frankly, hard to read. Even if we can go on to something else while she is doing that or whatever.

TC: Assuming it's available, the government certainly has no objection to that.

MJ: I assume they are available, are they not?

WITNESS: Yes, sir, back in my office.

MJ: Very well, would you like to see those before you conduct any further examination?

CC: Please.

[312] MJ: Could you accommodate us, please, Special Agent.

WITNESS: Sure, no problem.

MJ: Very well, we are in recess until that can be accomplished.

The Article 39(a) session recessed at 1645, 16 March 1989.

An Article 39(a) session was called to order at 1708, 16 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present.

RECROSS-EXAMINATION

Questions by the defense:

Q. Special Agent Sentell, during the break you were able to obtain and retrieve from your files the document that's the log interview/interrogation log personnel data sheet dated 4 November '88 in reference to this case, is that correct?

A. Yes, I was.

Q. Flipping to the original, if you would, please, in examining that in the manner in which you've been trained as an investigator and the background that you have, isn't it correct the time on the log sheet that was originally placed at the exercise of the suspect's rights was 1757?

A. I beg your pardon? Where he exercises his rights?

Q. Where it is circled "exercised his rights," the original time put down was 1757, isn't that correct?

A. No.

Q. What time was the original time put down there?

A. It was 6. I put down 6:57.

Q. Would you mind holding that document up to the light and looking at it.

A. [Doing as directed.] 6.

Q. That's still your testimony that it's 6?

A. Yes.

Q. Is it rather coincidental that the time break for the rest was at 1757 at the bottom?

A. No.

[313] Q. Nothing coincidental about that at all?

A. No. It just is a coincidence.

Q. Nothing coincidental about the time on the rest break being changed either?

A. No.

Q. Now, with respect to your notes, you say you clarified whether or not he wanted a lawyer at 1753, is that correct?

A. Yes.

Q. What did you do to clarify whether or not he wanted a lawyer? What did you, Agent Sentell, do or what did Mr. Clark under your direction do at 1753 to clarify that?

A. Both of us, we said, "Well, wait a minute, we're not—are you asking for a lawyer? We're not here to violate your rights in any way to a lawyer."

Q. Did you tell him he could call the legal office?

A. No, we did not tell the legal office.

Q. Did you tell him he could call a civilian attorney?

A. No.

Q. Did you stop questioning him?

A. Yes.

Q. I thought you just said you questioned him further? You and Clark asked him whether —

A. Pertaining to the case. Pertaining to the investigation. The questions we were asking were relative. "Do you want a lawyer? Are you telling us you want a lawyer?"

Q. Well, you didn't ask those questions when you terminated the interview?

A. No, because it was very definite because the way that he brought it up was "maybe, I should talk to a lawyer."

Q. Where in your notes does it indicate that he ever asked for a lawyer at the termination of the interview?

A. I did not put that in my notes. I just know that the interview was terminated when he said, "I want a lawyer," and that's exactly what when we stopped, and he made it very clear he wanted a lawyer. It wasn't a "maybe" as an offhanded comment; it was a very definite, "I want a lawyer." We didn't question him any further.

[314] Q. And you thought that when he asked you at 1753 that it was just an offhanded comment that he wanted a lawyer?

A. We clarified that.

Q. "We" being?

A. We meaning Mr. Clark and I. "Are you asking for a lawyer? Do you want a lawyer?" "No." But at the end of the interview, he said, "I want a lawyer." That's a very definite statement. We did not question, "Are you asking for a lawyer?" or anything along those lines. It was a definite statement he provided to us.

Q. And at the end of that interrogation with him, you were satisfied that you had questioned to all the pertinent aspects of the investigation. You had completed your interrogation.

A. No, we still had further questions to go.

Q. And what were those?

A. I don't recall at the time.

Q. Well, you recall everything else about this interview. What other questions did you have at the termination of the interview regarding his input in the case?

A. I do not have any recall at this time.

Q. Certainly at 1753, you hadn't gotten all the information you wanted.

A. Or at 1857.

CC: Beg the court's indulgence.

[Defense counsel conferred.]

CC: We have no further questions of this witness, Your Honor.

MJ: Very well, may I see the documents, please.

WITNESS: This is the—did you want my notes?

MJ: I wanted the original log.

WITNESS: Oh, here you go. [Handing the documents to the military judge.]

MJ: May I see your notes, please.

[The requested document was handed to the military judge.]

MJ: Thank you.

[315] TC: Your Honor.

MJ: Sir,

TC: The notes were never entered as Appellate Exhibits. The government would just propose that marking them as the next Appellate Exhibit in order. Offering them.

MJ: What number is that, Mr. Arenberg?

REPORTER: It will be XXXIX, sir.

MJ: What's XXXVIII? The log?

REPORTER: XXXVIII is the interview log.

MJ: Very well, thank you.

WITNESS: Could I have my original?

MJ: No.

WITNESS: Okay.

MJ: Sorry.

WITNESS: Okay.

MJ: I have a thing about Xeroxed copies.

WITNESS: Okay.

MJ: I'm sorry, I'm out of phase here. The log and then the notes are?

REPORTER: The interview log is XXXVIII and the notes are XXXIX.

MJ: Thank you.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. According to your log, and according to testimony, at 1753, Seaman Davis said maybe he should talk to a lawyer, and according to your notes questions stopped and the note is "clarified did he or did [316] he not want lawyer, he said, 'No.' " What do you mean by "clarified"? Could you expand on that, please, ma'am.

A. Okay. Well, Your Honor, he made it in such an offhanded comment that it was not a request, it didn't sound like a request, and we wanted to make sure that was he requesting a lawyer at that point and did he want to talk to a lawyer at that point, and it was just a matter of, well, was it made in an offhanded comment or was he saying that he wanted a lawyer, and that's why we wanted to clarify it. It was, "But listen, if you want a lawyer, we're not here to violate any of your rights; if you want a lawyer, you get a lawyer," basically, is what it boiled down to. We explained that to him.

Q. And what was his response?

A. He said no, he didn't want a lawyer because he didn't think that he needed a lawyer and that he didn't need a lawyer because he said he didn't kill the guy, and

that if he did kill the guy, he said he was the type of person that had to tell someone about it.

Q. So, the last substantive statement he made was about, I think, it is Kaiser, is that right? Here I will let you look at your notes, I wasn't trying to test you.

A. Yes.

Q. And then he indicated that at that time for some reason, he decided he did want a lawyer?

A. No, what we did was we went back over a few things that he'd already talked about in the club, about his activities and about what we'd already talked about, and it says we were asking different things about, well, if you said that—different things about the investigation but it was rehash of what was already covered in the interview.

Q. Well, then if it was a rehash, what triggered him to suddenly decide that he unequivocally wanted an attorney?

A. He said—

Q. Well, I'm not really interested in what he said but what, apparently in your mind triggered his invocation of his right to have an attorney.

A. He said, "I want a lawyer."

Q. I understand that, but what preceded the—

A. He repeated a statement that he'd said prior to that time. It was, like, I had to tell someone, and I said, "You have, and we have a sworn statement from the individual." He said, "I want a lawyer."

Q. Very well.

A. I mean it was a very definite, "I want a lawyer." I went, "No problem."

[317] MJ: Thank you, ma'am. If you would like, Mr. Arenberg, will be happy to make a copy of this for you unless you already have one.

WITNESS: I believe I've got a copy somewhere.

MJ: Very well, any questions based upon the inquiry of the military judge?

DC: No, sir.

TC: No, sir.

There being no further questions, the witness was excused and withdrew from the courtroom.

MJ: Anything further on the motion, please?

TC: Sir, as the next Appellate Exhibit in order, the government would offer the results of interview that was produced as a result of that interrogation.

MJ: Very well, that is —

REPORTER: It will be XL.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XL, consisting of three pages, to the military judge. The government has nothing further on this, with regard to this aspect of the motion, Your Honor.

MJ: This she got out of all those notes? All this came out of that little sheet of notes?

TC: Yes, sir.

MJ: Wow. Is this also a Xerox? I made it clear that I expect in a general court, we get originals. I'm aware of the rule, but why does Naval Investigative Service fill out these forms unless they are for admission in court-martial. Why is retention in their record more important than submission in a general court-martial, Captain?

TC: I can't answer that, sir.

MJ: Well, please, in the future I want originals if they are going to come into a court-martial.

TC: As a matter of course, it's a rare occasion when we're provided an NIS investigation that has any originals in it.

[318] MJ: Well, I expect them particularly in a general court-martial, and the poor counsel over here have been using copies that are barely discernible.

MJ: Very well, anything further, sir?

TC: No, Your Honor.

MJ: Mr. Savage.

CC: We would call Robert Davis.

MJ: Surely.

DC: Seaman Davis will be testifying for the limited purpose of the motion, sir.

MJ: Understood.

Operations Specialist Seaman Apprentice Robert Lee Davis, United States Navy, was called as a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the military judge:

Q. Very well, you are the accused in this case, is that correct?

A. Yes, sir.

MJ: Very well, won't you, please, proceed.

Questions by the defense:

Q. Going right to, Mr. Davis, November 4, where were you on the 4th of November 1988?

A. I was in the Naval Hospital.

Q. How were you released from the Naval Hospital?

A. NIS people came to pick me up, three gentlemen.

Q. Were you taken out in handcuffs?

A. Yes, I was.

Q. You were restrained. You were taken to the NIS headquarters or office, whatever, however they refer to their — where Ms. Sentell works, that's where you were taken?

A. Yes, sir.

[319] Q. What was your restraint at the time you were in the NIS office?

A. I was handcuffed to a chair.

Q. Now, during the course of their questioning of you, did you ever ask for a lawyer?

A. Yes, I did.

Q. Tell the Judge when that happened, what happened in terms of your talking to Ms. Sentell or Mr. Clark and what they did with respect to you.

A. Well, they were talking to me, and I said, "Well, I'd like a lawyer," and they said, "We'll take a break," and they walked out and left me handcuffed to the chair, and an older guy came in and stood by the door watching me.

Q. When you say "an older guy," have we seen him in the courtroom today or yesterday?

A. No, we haven't.

Q. So, in addition to the NIS agents that have testified, Mr. Clark and Ms. Sentell, it's your testimony that there was another agent or party?

A. At that time, there was.

Q. Did he ever identify himself?

A. No, he didn't.

Q. And is it your testimony that Sentell and Clark, Ms. Sentell and Mr. Clark, left the room?

A. Yes, they did.

Q. And you remained in the room with the third party, an unidentified third party?

A. Yes, sir.

Q. Did they ever return?

A. Yes, sir.

Q. Is that the time then that you were taken back to the brig?

A. No, sir.

Q. What happened at that time?

A. They came back in and started questioning me again.

CC: Kindly answer any questions the prosecutor might have.

[320]

CROSS-EXAMINATION

Questions by the prosecution:

Q. Seaman Apprentice Davis, you mentioned an older man, apparently, an NIS agent that was present at some point when you were at NIS, was he present when you were being interviewed by Special Agent Clark and Special Agent Sentell?

A. No, he wasn't.

Q. Was it just yourself along with Special Agent Clark and Special Agent Sentell?

A. Yes, sir.

Q. What about when you asked for a lawyer? Who was present then?

A. Those two.

Q. How did you ask for a lawyer? What did you say?

A. I said, "I would like a lawyer."

Q. And what happened after that?

A. They said, "We'll take a break" and walked out.

Q. What happened when they came back in?

A. They just came back in, and they gave me Copenhagen, and then they started questioning me.

Q. Did they talk to you any more about asking for a lawyer? Did they ask you any further questions about wanting a lawyer when they came back in?

A. No, they didn't.

Q. Did they handle—let me rephrase that. When you asked for a lawyer, did they just stop questioning you and walk out of the room or—?

A. They said, "We'll take a break" and walked out.

Q. Did they ask you any further questions at that time?

A. No, they didn't.

Q. So you didn't talk to them at all prior to the break? I mean between the time you mentioned a lawyer and the

time y'all took a break, you didn't say anything further to them?

A. No, I didn't

Q. And they didn't say anything except, "We'll take a break"?

A. They said, "We'll take a break" and walked out.

[321] Q. And when they came back in, nothing was mentioned about a lawyer?

A. No, sir.

Q. Did you say anything about a lawyer when they came back in?

A. No, sir.

Q. Who started speaking first when they came back in?

A. They did. They offered me Copenhagen.

Q. What about after that?

A. They just kept asking me questions.

Q. Then they started asking you questions?

A. Yes, sir.

TC: The government has no further questions, Your Honor.

MJ: Mr. Savage?

CC: [Negative response.]

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Obviously, you knew you had the right to ask for a lawyer, is that correct?

A. Yes, sir.

Q. When they just left you and came back in and started talking, why didn't you pursue your desire for a lawyer?

A. I really didn't understand, you know, what was going on.

Q. Well, let me ask you, why didn't you just say, "Well, where's my lawyer? How come I'm not getting a lawyer?"

A. They didn't tell me anything, you know, about a lawyer.

Q. Now, you heard Agent Sentell testify that some time later, and I don't have the times because I gave the exhibits back to the court reporter, but at some time later, you, again, asked for a lawyer and then what happened? Is that what occurred, first of all, did you then ask for a lawyer at a later time?

A. Yes, I did.

Q. How was that any different?

A. That was basically the same way. I said, "I want a lawyer."

Q. What happened then, Seaman?

A. They stopped again.

[322] Q. Did they then come back and try and interrogate you any further?

A. They came back in the room. They asked me a couple questions, you know, then they took me and fingerprinted me.

Q. But largely, they did not question you any further?

A. No, sir.

Q. I'm sorry, I don't mean to be technical, but is your answer is they did not question you any further, is that correct?

A. Question me any further when, sir?

Q. I didn't mean to confuse you. The second time when you said I wanted a lawyer, what did they do, could you tell me, please?

A. They asked me, like, two questions and then they took me and fingerprinted me.

Q. But other than that, they didn't ask you any questions, is that correct?

A. That's correct, sir.

MJ: Very well, fine. Thank you. Any questions based upon the inquiry of the military judge?

[Negative response.]

MJ: You may return to your seat, please.

There being no further questions, the witness was excused and returned to his seat.

CC: That's all we have, Your Honor.

MJ: Very well.

TC: Based upon the testimony of the accused, Your Honor, the government would call Special Agent Clark. He's in his office.

MJ: Do you want to do that this evening or do you want to—how long will it—

TC: He's standing by, sir.

MJ: Very well, summon Mr. Clark, would you, please. How long will that take?

TC: It should be just a few minutes, sir.

MJ: Ask him to bring his notes, his original notes.

[323] TC: Yes, sir.

MJ: Very well, we will be in recess.

The Article 39(a) session recessed at 1733, 16 March 1989.

The Article 39(a) session was called to order at 1741, 16 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present in court, and Special Agent Clark has resumed the witness stand.

Mr. Keith Clark, Naval Investigative Service, was recalled as a witness for the government, was reminded that he was still under oath and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Clark, you testified earlier concerning an interview of the accused on the 20th of October 1988. Did you have occasion to speak with Seaman Apprentice Davis at any time after that?

A. Yes, I did.

Q. When was that?

A. The next time that I interviewed Davis was on the 4th of November and that was an interrogation.

Q. Where did that take place?

A. That took place at the NIS office in this building.

Q. Prior to that interview, had Seaman Apprentice Davis been apprehended?

A. Yes, he had.

Q. Prior to asking questions of Seaman Apprentice Davis, was he advised of his rights?

A. Yes, he was.

Q. Did he exercise any sort of waiver of those rights?

A. Yes, he did sign a waiver of rights form which was explained to him.

[324] Q. Did any questioning occur before you advised him of his rights and he waived them?

A. No, it did not.

Q. Approximately how long did the interview last?

A. The interview lasted from approximately 4:30 in the afternoon to a little after, I believe 7:00.

Q. How did the interview terminate?

A. The interview terminated by Davis requesting an attorney.

Q. At that point, did all questioning cease?

A. Yes, it did.

Q. Did you question him any further after that?

A. No, we did not.

Q. Prior to the time when you began questioning him after executing the rights form and so on, and after that and prior to 7:00 when he requested an attorney, did he request—make any sort of mention of request an attorney prior to that, prior to 7:00?

A. Yes. During the interview, Davis did make a statement or he said, "Maybe" or words to the effect, "Maybe I should get an attorney." It wasn't real clear that he was asking for an attorney at that time, and we stopped questioning to clarify that point.

Q. Do you remember that vein in which he mentioned an attorney, did he specifically say, "I want an attorney"?

A. No, it was not a direct statement that he wanted an attorney before any further questioning or he wanted an attorney present. It was kind of an offhanded comment that, like, "Oh, boy, maybe I should get a lawyer," and it wasn't a direct statement that he was asking for a lawyer. That's why we kept—

Q. What did you do when he made that remark? What, if anything, did you do?

A. Both myself and Special Agent Sentell stopped the questioning and asked him directly if he wanted an attorney present before any further questioning and clarified it to him that we could not ask any more questions if he was, in fact, asking for an attorney at that time.

Q. You took a break at some point during the interview, correct?

A. That's correct.

Q. Did you take your break when he asked for the lawyer?

A. The break occurred approximately about the same time. Whenever this came up and we tried to clarify it with him as whether or not he needed or wanted an attorney and the fact that we couldn't question him any more if in

fact he was saying he wanted an attorney. Then we [325] took a break. His response to that was that, well, no, he didn't do it and he didn't need an attorney.

Q. So, in addition to saying that he didn't need an attorney, he said other things?

A. In addition to saying that he didn't need an attorney, I do believe he stated that, "No, I didn't do it," or words to that effect. and he didn't need an attorney. But we made it very clear to him that if, in fact, he thought he needed an attorney, we would stop right there and made it very clear to him that we could not question him any further if that was, in fact, what he was requesting.

Q. After mentioning the attorney, Seaman Apprentice Davis, according to your testimony, went beyond that and carried on further conversation. Was anything additionally said? Was that in response to questions to you or was that—or did he go beyond simply saying he didn't want an attorney? Was that on his own or something he said in response to questions?

A. The fact that he didn't want an attorney or clarifying the fact that, no, he was not requesting an attorney was only in response to our asking him if, in fact, he wanted an attorney to clarify what he had just stated, was he really requesting an attorney or not. After him making that statement and he initiated further comments, we had a break right then and came back in the room.

Q. You said that Seaman Apprentice Davis made further comments?

A. Yes.

Q. Comments that were not in response to questions?

A. Yes, comments—I believe about the first comment that was made besides, "Well, no, I didn't do it," and "I don't need an attorney," he said something to the effect that if he had done it, he would have been the type that

would have to have told somebody about it, and initiated the conversation like that.

Q. Special Agent Clark, did you make any notes during the course of the interview?

A. I did make notes during the course of that interview.

Q. One other thing, with regard to the interrogation of Seaman Apprentice Davis, was there a log kept of that interrogation?

A. Yes, there was a log of the time he entered the room and various times throughout.

Q. How many logs were there? Did each of you keep a log, both you and Special Agent Sentell or was there just one kept?

A. There was just one log kept.

[326] Q. With regard to your notes, do you have those with you?

A. I do not have the notes of that interview. I have searched for them and have been unable to locate them.

Q. Have you destroyed them?

A. I have not destroyed them. I have just misplaced them. I do not know where they are right now.

TC: The government has no further questions.

MJ: Counselor.

CC: May it please the court.

CROSS-EXAMINATION

Questions by the defense:

Q. I don't know if it was today or yesterday, but I know you were on the stand before. Was that today? Yesterday?

A. That was yesterday.

Q. Yesterday in response to some questions, Mr. Clark, you were giving us procedures that you as NIS

agent follow in conjunction with Agent Sentell, and I recall—I believe I recall you saying that on some occasions you took notes and some occasions, she took notes, is that correct?

A. Yes, that's correct.

Q. Is that how you proceeded with respect to this investigation?

A. In this particular interrogation, both of us took notes.

Q. All right, so with respect to this aspect of the overall investigation, this particular interrogation was more important than other interrogations or other interviews that you had conducted. Is that a fair statement?

A. That's a fair statement. It was considered to be an important interrogation, yes.

Q. And the reason why you took notes and Agent Sentell took notes is so that it could be fully documented as to the questions and responses given by Davis who was then clearly a suspect in this case, isn't that correct?

A. It is correct. We both took notes so that if anything that I missed writing down, she would get and vice versa.

[327] Q. But the purpose of you both taking notes was to ensure the completeness and the accuracy of the information that was taken, is that correct?

A. That's correct.

Q. Why then, sir, didn't you video tape this interrogation?

A. Well, it didn't occur to us to have to video tape the interrogation. It's not a normal procedure that we follow.

Q. Do you have a tape recorder?

A. Yes, we do have a tape recorder.

Q. Do you often use tape recorders when you go out and dictate in them, reports of investigation?

A. No, we do not.

Q. What do you have the tape recorders for?

A. We don't have any NIS issued tape recorders. If I'm on a surveillance or something where I can't write down notes, I may dictate notes.

Q. You dictate notes, correct, into a tape recorder? They provide you with one. Did you do that?

A. No, they don't provide me with one. I do have one.

Q. But you do that. You, Agent Clark, have done that in other cases.

A. Yes, I have.

Q. You did it in this case.

A. I did it on one occasion in this case.

Q. Do you still have that tape?

A. Yes.

Q. Why didn't you tape record this interrogation which you say was the most important thing you did in terms of an interview in this case?

A. It's not standard NIS policy to tape interrogations or interviews.

Q. You've lost your notes or misplaced your notes?

A. At this time, I have searched for them today, I have not been able to find them.

Q. Do you remember when Captain Thompson called you back in February and directed you to preserve all your handwritten notes in this case?

A. I recall being told that I might need my notes later, and I, certainly, had not intentionally misplaced any notes.

[328] Q. That was not my question. My question is do you recall back in February, Captain Thompson directing you to preserve your handwritten notes in this case.

A. Actually, I don't recall a directive from Captain Thompson telling me to preserve them. It would be a standard policy to preserve our notes anyway.

Q. So this case wouldn't be handled any differently than any other in terms of preserving your notes?

A. That's correct.

Q. Do you recall any emphasis being placed on the importance of preserving your handwritten notes in this case?

A. Yes, there seems that there was some emphasis placed on being sure that our notes were kept. We, of course, assured—they are kept.

Q. Now, when you came back to NIS headquarters or the NIS office, the local NIS office here, that is in this building as I understand it, is that correct?

A. Yes.

Q. And you went and picked up the accused from the hospital. You did that, correct?

A. That's correct.

Q. And who was with you at that time?

A. Special Agent Watson and Special Agent Canady.

Q. And he was restrained and taken back to your office.

A. That's correct.

Q. In the office, his restraints were—was he unleashed or unrestrained?

A. Okay, he was unhandcuffed and then rehandcuffed to a chair.

Q. So, he was restrained in the office?

A. Yes, he was.

Q. Did the other agents who were involved in the transportation of Mr. Davis then leave the building or leave the office where he was being interviewed?

A. There were other agents in the office.

Q. In the office?

A. In the office, not in room that we were in but in the office.

Q. The room that you were in when you interviewed Mr. Davis, you, Agent Sentell and Mr. Davis were in the room.

A. That's correct.

[329] Q. During the course of your debriefing or interview or interrogation of Mr. Davis, did you ever leave the room?

A. Yes, I did.

Q. During the course of your interview of Mr. Davis, did Ms. Sentell leave the room?

A. This was during the breaks, yes.

Q. Now, would you repeat that, please.

A. I'm sorry. It was not during the course of our actual interviewing, it was during a break.

Q. Did you say break, singular, or break, plural?

A. Well, it should be break singular.

Q. Did the both of you leave the room?

A. Not at the same time or we never left Davis unattended.

Q. Was there ever any third person there? Was there an older gentlemen?

A. Yes, I believe the special agent in charge was in the office. Mr. O'Connor, our assistant special agent in charge was in the office and may have stood by while I and Agent Sentell separated or during the break.

Q. During the break, didn't you and Agent Sentell go out in the hall and discuss tactics, procedures, questions that you were then going to ask him? I mean, during the break didn't you both leave the room and go out and discuss what you were doing and what you were going to do?

A. Yes, I believe we did.

Q. When you came back in, you asked him if he wanted to smoke a cigarette or have a Coca Cola?

A. Yes, we asked him, I know, if he wanted a drink and asked him if he smoked. I don't believe he smokes.

Q. What did he do? Did you give him anything to chew or perhaps, something to snuff?

A. Yeah, I do believe—you've refreshed my memory there. I do believe that he wanted a dip of snuff.

Q. When you came back in from the break, did you readvise him of his rights?

A. We didn't readvise him of his same rights, however, we did advise him that the same rights applied.

[330] Q. Well, in the log sheet—now, I understand you didn't keep the log, is that correct?

A. That's correct.

Q. Were there any errors on the log sheet that you recall?

A. There were some corrections on the times as they were written down.

Q. Any other errors other than times?

A. Other than the times, I don't recall.

Q. On section 13, it says interrogation breaks, include stop/start times and rewarning if necessary. What do they mean "rewarning if necessary"? What does that mean?

A. That would mean if there was an exceptionally long period of time between the start and stop such as ending from one day and picking up the next day or if, for some reason, it seemed that there should be an additional warning.

Q. Well, clearly, Mr. Clark, we have established and we can agree that immediately prior to the break, Mr. Davis requested an attorney. Can we agree to that?

A. Prior to the break?

Q. Yes, sir.

A. He had mentioned it and we had clarified whether or not he actually was asking for an attorney.

Q. And then you took a break.

A. That's correct.

Q. And the break — during the break you left the room with Ms. Sentell. You were gone about 10 minutes and you came back in and you continued your interview with him.

A. Yes, the interview continued after we returned to the room.

Q. Never asked him to resign or reaffirm his waiver of his 31's?

A. No, we didn't.

Q. As soon as he came back in the room, or, excuse me, as soon as you and Ms. Sentell came back in the room, the first line of questioning of Mr. Davis was or his first responses to you were, "He didn't kill anybody and if he killed somebody he'd have to tell somebody," isn't that correct?

A. I believe that happened before the break.

Q. Before the break?

A. Yes.

[331] Q. Well, didn't you just testify in response to Captain Thompson's questions that it happened right after the break, and I'm not trying to confuse you, if you need to look at your notes or whatever.

A. I'm trying to get that straight. During the time that we were clarifying his comment.

Q. When you say "we" now who are you talking about?

A. Special Agent Sentell and myself. She made it very clear to him that we couldn't continue questioning if he was, in fact, asking for an attorney, and I made it extremely clear to him that I could not initiate any further questions and did not intend to unless he, in fact, was not asking for an attorney and needed to know if, in fact, he needed or wanted an attorney at that time, and, specifically, when we left, okay, and it was right after the clarification of that, we took a break, and I know that the next

comment that was made, and I believe that that was right at the end of that clarification and just before the break that he said that he didn't need an attorney and that he didn't kill the guy and that if he had, he'd have to tell somebody.

Q. And that's a clear recollection of yours. I mean, there's no hidden agenda there, that's what happened, correct?

A. To the best of my memory serving, yes, that is what happened.

Q. Now, when you — as you say, "we" and when I use your term "we," that is Sentell and Clark.

A. Right, in this situation, that's Sentell and myself.

Q. Clarification. During the clarification process of whether or not Davis wanted a lawyer, did you tell him that he had the right to remain silent and that if he continued to make statements that they would be used against him?

A. No, I don't believe I reiterated that.

Q. Did you tell him that he had a right at that time to consult with a lawyer and that the United States Navy would provide him with a lawyer right at that moment?

A. No, I didn't use those words.

Q. Did you tell him that he had a right to call up a civilian lawyer provided he'd pay for it, and he could consult with that lawyer at that time?

A. No, I didn't do that.

Q. And that is what I'm talking about in terms of the clarification, none of those questions were asked to clarify whether or not he wanted a lawyer.

A. None of those specifically.

CC: We have no further questions of this witness, Your Honor.

[332]

REDIRECT EXAMINATION

Questions by the prosecution:

Q. Once again, Special Agent Clark, when the subject of a lawyer, one way or another, came up the first time, did Seaman Davis specifically request a lawyer?

A. No, he did not specifically request a lawyer.

Q. Now you said that when he did that, you didn't go through all the rights once again. Did he indicate any misunderstanding or lack of understanding of the rights you'd earlier advised?

A. No, he seemed very clear about them.

Q. Did he have any — when he finally ascertained those rights later on in the interview, did he seem to have any hesitation or doubt about doing so?

A. No, and there was doubt in my mind that he was requesting an attorney at that time and the interview ended right then.

Q. After he had mentioned a lawyer, are you certain that you clarified that?

A. There's no doubt in my mind that that was made exceptionally clear.

Q. Was Seaman Apprentice Davis unequivocal in his statements that he didn't want or need a lawyer?

A. Yes, it was very plain that he did not wish to request a lawyer at that time.

Q. Special Agent Sentell's notes indicate that he asked for a lawyer about 1753. The interrogation log indicates that you went on a rest break about 1757. Do those times — does that sound accurate?

A. That sounds accurate. It would take approximately five minutes or so, the time spent in there before we could take a break.

Q. So there were a few minutes that transpired between the time he mentioned lawyer and the time you left

the room on a break?

A. Yes, it did.

Q. And it was during that period of time that you clarified the lawyer?

A. Yes, it was.

Q. It was during that time that he initiated further conversation?

A. Yes, it is.

TC: The government has no further questions.

[333] MJ: Recross, sir?

CC: We have no questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. During the break, where was the accused located, sir?

A. He was seated in a chair.

Q. So, he didn't leave the interrogation room?

A. I don't believe he did at that time. There was one time, I believe, that he used the bathroom.

Q. Is there a head attached?

A. There are several bathrooms, and there was one just across the hall.

Q. So he had to be uncuffed and — ?

A. Yes.

Q. Did you have to escort him into the head or what's the procedure?

A. The procedure there is that he was handcuffed or rehandcuffed in front of his body so he could still be cuffed and use the bathroom without any real problem, and I stood by the door while he was using the bathroom.

Q. So these bathrooms are individual private heads?

A. Yes.

Q. Because you are in a section that used to be the hospital?

A. That's correct.

MJ: Thank you. I have no other questions. Any other questions of the agent, please?

DC: No, thank you, sir.

There being no further questions, the witness was excused and withdrew from the courtroom.

TC: The government has nothing further, Your Honor.

CC: We have nothing further, Your Honor.

* * * * *

[341] MJ: Very well, while the military judge shares Mr. Savage's reservations as to the standard Naval Investigative Service waiver of rights form, and I would note in that regard the more straightforward form prescribed by the Judge Advocate General in his Section 0175 of [342] his Manual, I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and *Tempia*, and that he intelligently and freely waived those rights. Moreover, I find the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel.

MJ: The motion to suppress the 4 November '88 statement is accordingly denied.

MJ: Very well, there were other portions to that motion, correct?

TC: No, sir, that was all we planned to cover with regard to that motion. There were some statements that were referred to with regard to the hospital. The government would propose covering those as a part of motion 11.

EDITOR'S NOTE

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U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 030CT98-06CS-0582-7HNA

INVESTIGATIVE ACTION: RESULTS OF INTERVIEW

ON 200CT98, ROBERT LEE DAVIS, OSSN USN, 302-60-5400, WAS INTERVIEWED ONBOARD THE USS MAHAN (DDG-42) BY REPORTING AGENT AND SPECIAL AGENT JEANMARIE V. SENTELL CONCERNING HIS KNOWLEDGE OF KEITH SCOTT SHACKELTON (DECEASED), AND ANY OTHER INDIVIDUALS PRESENT AT THE ENLISTED CLUB ON 020CT98.

DAVIS STATED HE WAS AT THE ENLISTED CLUB LOCATED ON NAVAL STATION CHARLESTON, ON THE FIRST SUNDAY IN OCTOBER, PAYDAY WEEKEND, 020CT98. DAVIS WAS SHOOTING POOL AT THE CLUB AND STAYED UNTIL CLOSING. DAVIS STATED HE ONLY SHOOTS POOL FOR MONEY AND HE DOES NOT PLAY POOL MUCH AT THE ENLISTED CLUB. DAVIS LEFT THE ENLISTED CLUB ON 020CT98 AND BELIEVED HE WENT BACK TO THE SHIP (USS MAHAN) WHERE HE CALLED HIS GIRLFRIEND "BERT" (ALBERTHA LYNN HEFFNER) AND STORED HIS POOL STICKS. DAVIS THEN STATED HE TOOK A CAB TO JW'S, A LOCAL NIGHT CLUB, WHERE HE MET WITH BERT. DAVIS AND BERT STAYED AT JW'S UNTIL CLOSING AND THEN THEY DROVE IN BERT'S CAR TO HER HOUSE LOCATED IN MEN-RIV HOUSING, GOOSE CREEK, SC. DAVIS STATED HE REMEMBERED WEARING JEAN TYPE PANTS WHICH HAD SIX POCKETS, TWO POCKETS ON THE LOWER LEG SECTION, AND A LIGHT BLUE SHIRT.

DAVIS WAS SHOWN A COMPUTERIZED PHOTOGRAPH OF SHACKELTON AND ASKED IF HE RECOGNIZED THE PERSON IN THE PICTURE. DAVIS STATED HE RECOGNIZED THE INDIVIDUAL IN THE PHOTO BUT DID NOT KNOW HIS NAME AND BELIEVED HE SHOT POOL WITH HIM.

DAVIS SATED HE SPENDS ABOUT \$40.00 TO \$50.00 PER NIGHT WHEN HE GOES OUT. DAVIS EXPLAINED HE GETS HIS MONEY FROM PLAYING POOL AND THAT HE MAKES ABOUT \$900.00 PER PAY DAY FROM SLUSHING (COLLECTING FROM USURY LOANS). DAVIS ALSO SAID HE OWES \$25.00 TO SOME MONEY FROM SLUSHING BECAUSE PEOPLE WHO DO NOT WANT TO BORROW MONEY FROM MULL WILL BORROW FROM HIM AND HE GETS THE MONEY FROM MULL.

DAVIS SAID HE FIRST HEARD ABOUT SHACKELTON'S DEATH ABOUT THREE DAYS AFTER IT HAPPENED. MADE (MADE BILBY) AND BONNIE (BONNIE KRUSEN) TOLD HIM THAT SHACKELTON WAS BEATEN WITH A POOL STICK. DAVIS SAID HE OWNS TWO POOL STICKS, ONE IS A MC DERMITT AND THE OTHER IS A DAVID HOWARD. WHEN ASKED IF HE WOULD ALLOW NIS TO EXAMINE HIS POOL STICKS HE SAID HE WOULD BUT THAT HE COULD NOT GET THEM AT THAT TIME BECAUSE THEY WERE IN BERT'S CAR AT HER HOUSE.

DAVIS WAS THEN TAKEN TO THE RESIDENCE OF ALBERTHA LYNN HEFFNER WHERE HE RECOVERED HIS POOL STICKS FROM HEFFNER'S VEHICLE. SPECIAL AGENT SENTELL CONTACTED ALBERTHA HEFFNER WHO WAS AT HOME AND ADVISED HER THAT DAVIS WAS GETTING HIS POOL STICKS FROM HER VEHICLE AND HEFFNER HAD NO OBJECTIONS.

WARNING APPELLATE EXHIBIT XXVIII

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U.S. NAVAL INVESTIGATIVE SERVICE

DAVIS TURNED OVER TO REPORTING AGENT ONE GREY POOL CASE
CONTAINING TWO POOL STICKS. DAVIS THEN VOLUNTEERED INFORMATION
THAT THERE WAS A SPOT ON THE OUTSIDE OF HIS POOL CASE WHICH MIGHT
BE A BLOOD STAIN AND THAT IT WAS HIS BLOOD. DAVIS SAID HE DID
NOT KNOW HOW THE SPOT GOT THERE AND THAT IT MIGHT NOT BE BLOOD AT
ALL BUT KETCHUP WHICH HE MAY HAVE SPILLED ON HIS CASE.

BIOGRAPHICAL DATA

NAME: ROBERT LEE DAVIS
EMPLOYMENT: US NAVY
DUTY STATION: USS MAHAN (DDG-42)
SSN: 302-60-5400
DOB: 10JAN67
POB: COLUMBUS, OH

REPORTING AGENT: KEITH V. CLARK
OFFICE: NISRA CHARLESTON, SC
DATE PREPARED: 20OCT98
DATE TYPED: 22NOV88

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U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

INVESTIGATIVE ACTION: RESULTS OF INQUIRIES/INTERVIEWS ABOARD THE
USS MAHAN

ON 19OCT88, AN ATTEMPT TO LOCATE SUBJECT ABOARD THE USS MAHAN DISCLOSED THAT HE WAS UA. ON 20OCT88, ICS JOHN T. KRAFT, CHIEF MASTER AT ARMS CONTACTED REPORTING AGENT TO ADVISE THAT SUBJECT RETURNED. UPON ARRIVAL, LCDR ROBERT MAYDOSZ, EXECUTIVE OFFICER, LTJG THOMAS R. MOSS, SUBJECT'S DIVISION OFFICER AND ICS KRAFT ADVISED REPORTING AGENT AND SPECIAL AGENT KEITH V. CLARK THAT SUBJECT MADE SOME REMARKS THAT MADE THEM QUESTION HIS MENTAL STABILITY AND THAT THEY WERE SENDING HIM TO THE MEDICAL OFFICER FOR A PSYCHOLOGICAL EVALUATION. THEY ALSO STATED THAT OS2 GUIDRY HAD SOME INFORMATION THAT MAY BE PERTINENT TO THE INVESTIGATION OF THE DEATH OF THE SAILOR. SUBJECT'S SERVICE RECORD WAS PROVIDED ALONG WITH THE DIVISION OFFICERS COUNSELING RECORDS. ON 25OCT88, WHEN SUBJECT'S SERVICE RECORD WAS RETURNED, CRD WILLIAM E. DOUD, THE COMMANDING OFFICER OF THE MAHAN ADVISED THE MEDICAL OFFICER'S REPORT ON SUBJECT INDICATED SUBJECT HAD AN EXTREME PERSONALITY DISORDER. THE MEDICAL OFFICER REPORTEDLY RECOMMENDED AN EXTENSIVE PSYCHOLOGICAL EVALUATION ON SUBJECT AT THE PSYCHIATRIC DEPARTMENT OF THE NAVAL HOSPITAL. THE FOLLOWING INFORMATION WAS OBTAINED FROM PERSONNEL ABOARD THE USS MAHAN (DDG-42) ON THE DATES INDICATED.

20OCT88, OS2 DAVID LLOYD GUIDRY, USN, 437-17-3736, ADVISED THAT PRIOR TO 06 OCT 88, SUBJECT TOLD HIM THAT VICTIM WAS KILLED WHEN HE WAS HIT AND JABBED WITH A POOL STICK.

20OCT88, FCC MARLOWE GENE SMITH, USN, 266-55-8407, DUTY MASTER AT ARMS, STATED HE WAS SITTING WITH SUBJECT WHILE REPORTING AGENT AND SPECIAL AGENT KEITH CLARK WERE INTERVIEWING OS2 GUIDRY. SMITH ADVISED SUBJECT WAS EXTREMELY NERVOUS AND TALKATIVE, SUBJECT INFORMED SMITH THAT HE DIDN'T KILL VICTIM, BUT HE KNEW WHO DID AND HE WASN'T GOING TO TELL ANYONE UNLESS IT LOOKS LIKE HE WAS GOING TO GET BLAMED FOR THE DEATH. SUBJECT ALSO TOLD SMITH THE PERSON THAT KILLED VICTIM KNEW MARTIAL ARTS AND DROVE A WHITE PICK-UP TRUCK.

08NOV88, HMC DOUGLAS C. MURRAY, USN, MEDICAL OFFICER, PROVIDED A LIST OF BLOOD TYPES FOR ALL PERSONNEL ASSIGNED TO THE USS MAHAN. HMC MURRAY ALSO REVIEWED HIS RECORDS OF INDIVIDUAL WHO REPORTED TO SICK CALL FOR ~~INJURIES~~ DURING THE THREE DAYS FOLLOWING VICTIM'S DEATH: MSSN-LIVINGSTON WAS THE ONLY PERSON WHO SUSTAINED AN INJURY CONSISTENT WITH AN ALTERCATION.

08NOV88, A LIST OF THE PERSONNEL WHO WERE UA ON 03 OCT 88 WAS OBTAINED: FN SIMPSON (EXTENDED PERIOD OF TIME, PRIOR TO AND AFTER 03OCT88); OSSN TORRIELLO; OSSN DAVIS; MSSA HULING (1 HOUR AND 15 MINUTES)

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U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

09NOV88, OSSR CIRO (NMN) TORRIELLO, USN 107-70-3737, ADVISED HE WAS NOT AWARE HE WAS SUPPOSED TO BE ON DUTY, HE WAS AT THE SIESTA HOTEL ON RIVERS AVE., CHARLESTON, SC WITH DS VERNON. TORRIELLO STATED HE WAS UA ON A SATURDAY, NOT A MONDAY.

09NOV88, MSSN CLAYTON LENARD LIVINGSTON, USN, 244-39-6706, STATED HE SUSTAINED THE INJURIES TO HIS ARM WHEN HE CLIMBED OVER A FENCE NEAR HIS APARTMENT COMPLEX.

09NOV88, OSSN MICHAEL DOYLE VANHOOSE, USN, 293-68-4364, STATED HE HAS KNOWN SUBJECT SINCE DEC87; HE ADVISED HE WAS NOT AT THE EM CLUB ON 02OCT88; HE SAID SUBJECT IS ADDICTED TO LYING AND HE HAS NO TROUBLE BELIEVING SUBJECT KILLED SOMEONE, HE ADDED THAT IF HE DID KILL THE GUY, IT WAS PROBABLY OVER MONEY. VANHOOSE STATED THAT SUBJECT CHANGES PERSONALITIES, HE'LL ACT LIKE THE KARATE KID FOR A FEW DAYS, THEN HE'LL CARRY HIS POOL STICKS AROUND THE WORK SPACES AND CHASE PEOPLE AROUND LIKE HE WOULD HIT THEM. VANHOOSE SAID DAVIS IS A POOL HUSTLER, HE LIKES TO PLAY POOL FOR MONEY AND SUBJECT DOES NOT APPEAR TO HAVE ANY RESPECT FOR MONEY OR HIS PROPERTY, LIKE HIS POOL STICKS. HE AMPLIFIED HIS STATEMENT BY SAYING THAT SUBJECT WILL TAKE CARE OF HIS POOL STICKS ONE DAY, THEN THROW HIS \$300.00 POOL STICK ON THE GROUND WHEN HE GETS ANGRY. HE ADDED THAT HE THOUGHT SUBJECT SEEMED TO BE LOW ON CASH THIS PAST MONTH.

09NOV88, SN ROBERT (NMN) VEGA, USN, 050-66-8963, REVIEWED THE PLAN OF THE DAY FOR THE WEEKEND OF 01OCT88, HE WAS ON DUTY SATURDAY AND SUNDAY, 01OCT88 AND 02OCT88, DUTY ENDED AT 0700 MONDAY, 03OCT88. HE STATED HE HAS BEEN TO JW'S WITH SUBJECT, HE THOUGHT IT WAS THE WEEKEND AFTER HE HAD DUTY.

09NOV88, HMM3 FLEETWOOD PRICE, USN, 259-39-4358, STATED HE EXAMINED MSSN LIVINGSTON'S INJURIES ON 05OCT88, HE ESTIMATED THE INJURY WAS OBTAINED WITHIN 16 HOURS OF RECEIVING TREATMENT.

09NOV88, MM3 KEVIN MARCELLUS HENRY, USN, 532-80-7704, COULD NOT PROVIDE ANY PERTINENT INFORMATION.

09NOV88, SN JEFFERY LAWRENCE DAIGLE, USN, 222-40-3597, STATED HE WAS WITH HIS GIRLFRIEND, CAROL CORNEILLE, ON 02OCT88 AND DIDN'T GO TO THE EM CLUB. DAIGLE DENIED KNOWLEDGE OF VICTIM'S DEATH UNTIL WADE BIELEY TOLD HIM HIS CONFISCATED HIS POOL STICK. HE ADVISED HE PLAYS POOL WITH SUBJECT AND BIELEY AT THE EM CLUB OR THE BOWLING ALLEY.

10NOV88, GMM1 JAMES EDWARD COOK, USN, 018-52-5801, DENIED GOING TO THE CLUB ON 02OCT88, HE SAID HE STARTED A TRAINING SCHOOL ON 03 OCT 88 AND NEEDED TO BE ALERT/RESTED SO HE DID NOT GO OUT. HE ADVISED WHEN HE INITIALLY HEARD ABOUT THE DEATH, HE "GAFFED" IT OFF BECAUSE HE THOUGHT IT WAS A RUMOR. COOK ADVISED SUBJECT'S ATTITUDE CAN CHANGE VERY QUICKLY FROM ~~WARNING~~ ANGRY, HE ALSO

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U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

PROVIDED NAMES OF SEVERAL OF SUBJECT'S FRIENDS.

10NOV88, SK2 LARRY DARNELL HENRY, USN, 068-46-8889, STATED HE DOES NOT LIVE ON THE SHIP AND WHAT HE KNOWS OF SUBJECT IS "HE'S A PAIN IN THE ASS".

PARTICIPATING AGENT
KEITH V. CLARK, SPECIAL AGENT, NISRA CHARLESTON, SC

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REPORTING AGENT: JEANMARIE V. SENTELL
OFFICE: NISRA CHARLESTON, SC
DATE PREPARED: 04DEC88
DATE TYPED: 04DEC88

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MILITARY SUSPENSION ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: NISRA CHARLESTON, SC

CHARLESTON, SC

I, ROBERT LEE DAVIS

have been advised by Special Agent(s) JEANMARIE V. SENTELL AND KEITH V. CLARK

that I am suspected of THE HOMICIDE OF KEITH SCOTT SHACKELTON

I have also been advised that:

- (1) I have the right to remain silent and make no statement at all;
- (2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and
- (5) I may terminate this interview at any time, for any reason.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

Signature: Robert Lee Davis

Date & Time: 1634 08 Nov 88

Witnessed:

Jeanmarie V. Sentell
Keith V. Clark

Date & Time: _____

At this time, I, _____
desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

APPELLATE EXHIBIT XXXVIII

NAVAL INVESTIGATIVE SERVICE
Investigative Notes

TITLE: _____

CCN: _____

MADE BY:

MADE AT:

DATE:

WLS

OGCS

4/1

*5 pages
6/10*

Dares

David Starnitz

was a enlisted sub in But

David

*brought out article of EM who
may / may not have stayed for*

*DAIS said he was a Butler's ally before EM
"made a living life"*

*Sunday-Sunday off to come out up
18-11 AM out stage post
Butler goes to EM Club, other club
goes to QM's*

*12-10/3 went to But's after QM's
was late - to find some one
was there but at club - 3 hours -
I can't remember / no info, but*

NISFORM 02102-01

APPELLATE EXHIBIT XXXVIII

TITLE: _____

CCN: _____

MADE BY:

MADE AT:

DATE:

TIME:

WS

DACS

4/20/07

if he wasn't in Bent he
might have been in club in
Phil Bennis

Vera

Mike Van Dooze - B/M

denied winning 50 Penn action

does not get upset if someone doesn't
pay him if he wins & Penn them

re: T-Shirt - Winton both sewed
Tuesday (25 Oct) took guns down
had back in blood - threw them out
gagged on urine - threw out blood
Should still be on pillow & bed sheets
T-Shirt was under his mouth at it
day before, putting it in his coffin
locker.

Investigative Notes

TITLE: _____

CCN: _____

MADE BY:

MADE AT:

DATE:

TIME:

JDS

OCCS

11/8

no one like the books either, except
 ~ 3 who are

(James) Book saw him opening his
 books & showed him he could
 open the book now - does not
 think Book could open the book

1753 - said maybe it should talk to a
 lawyer - I question stopped - clarified
 did he or did he not want lawyers
 said no

brought up Dave Smith - said he was
 taking a conversation to Smith &
 he said I was not by a foot out
 because Smith didn't know he liked
 to know everything or make people
 think he knew everything

TITLE: _____

CCN: _____

MADE BY:

QAS

MADE AT:

OACS

DATE:

11/4

TIME:

174

He added the info re: pool stick
 & Guidry
 then he changed statement & said
 Buckley told him.

He said he thought he knew
 who did it - Jeff Laisey -
 because he didn't go to the
 club for who after & billie -
 was doing acid that night &
 was afraid he did something
 he might not remember -

U.S. NAVAL INVESTIGATIVE SERVICE

REPORT: S/DAVIS, ROBERT DEE/OSCN USN
 COM: 3500733-0305-0533-789A

INVESTIGATIVE ACTION: RESULTS OF INTERVIEW WITH E.L. DAVIS

175

APPELLATE EXHIBIT XL

ON 04NOV38, OSCN ROBERT DEE DAVIS, USN, 500-60-5400, WAS INTERVIEWED BY REPORTING AGENT AND SPECIAL AGENT KETTER V. CLARK AT NISRA CHARLESTON, SC. DAVIS, HEREIN AFTER REFERRED TO AS SUBJECT, WAS INFORMED THAT HE WAS SUSPECTED OF THE MURDER OF KETTER S. SHACKLETON AND WAS READ THE ATTACHED MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS, EXHIBIT (1) HEREAS, SUBJECT WAS ASKED IF HE UNDERSTOOD HIS RIGHTS AS THEY WERE READ TO HIM, HE REPLIED 'YES'. HE WAS THEN ASKED IF HE WISHED TO CONSULT WITH A LAWYER PRIOR TO ANY QUESTIONING, HE REPLIED 'NO'. SUBJECT WAS PROVIDED EXHIBIT (2) AND ASKED TO READ THE FORM AND TOLD TO POINT OUT ANY PART THAT HE MAY HAVE A QUESTION ABOUT OR A WORD THAT HE DID NOT UNDERSTAND. UPON COMPLETION OF SUBJECT READING THE FORM, SUBJECT WAS ASKED IF HE HAD ANY QUESTIONS ABOUT HIS RIGHTS OR THE FORM, HE SAID 'NO'. SUBJECT WAS ASKED IF HE WOULD ANSWER SOME QUESTIONS ABOUT THE ALLEGATIONS, HE SAID YES BECAUSE HE DIDN'T KILL THE GUY AND SIGNED THE WAIVER OF RIGHTS.

SUBJECT WAS ASKED TO REPEAT HIS ACTIVITIES ON SUNDAY 00OCT38. HE WAS GIVEN A REFERENCE POINT, 01OCT38, THE SATURDAY PAYDAY BECAUSE OF THE END OF THE FISCAL YEAR. SUBJECT STATED HE LEADS A BORING LIFE AND DOES THE SAME THING EVERY SATURDAY OR SUNDAY HE IS OFF DUTY. HE STATED HE GETS UP AROUND 10 OR 11 AM, EATS, PLAYS POOL AT THE BOWLING ALLEY, GOES TO J.W.'S (A BAR THAT IS LOCATED OFF-BASE). SUBJECT THEN STATED HE WAS AT THE EM CLUB ON 02OCT38 WITH BERT (ALBERTA HEEFNER). THEY DANCED HE MAY OR MAYNOT HAVE PLAYED POOL, BUT HE STATED HE ALWAYS HAS HIS POOL STICKS WITH HIM. HE THEN STATED HE AND BERT WENT TO J.W.'S AND WHEN HE WENT TO BERT'S HOUSE. SUBJECT DID NOT HAVE ANY IDEA WHAT TIME HE ARRIVED AT BERT'S HOUSE. IT WAS LATE. HE SAID HE WAS LATE FOR WORK THE NEXT DAY BECAUSE HE WAS TIRED AND HUNG OVER. BERT BROUGHT HIM BACK TO THE SHIP AT ABOUT 1PM OR 2PM ON 03OCT38. SUBJECT CONFIRMED BERT LIVES IN MENAIV GOVERNMENT HOUSING, IN GOOSE CREEK, SC. HE WAS ASKED WHY HE TOLD HIS DIVISION OFFICER HE WENT TO COLUMBIA THE PREVIOUS NIGHT. SUBJECT STATED HE DIDN'T WANT TO GET INTO ANYMORE TROUBLE BY BEING WITH A MARRIED WOMAN, SO HE MADE UP THE STORY ABOUT GOING TO COLUMBIA. SUBJECT WAS INFORMED THAT BERT STATED SHE WAS NOT AT THE CLUB THAT SUNDAY NIGHT BECAUSE SHE WAS LOW ON FUNDS AND COULDN'T PAY FOR THE BABYSITTER. SUBJECT THEN STATED HE WAS AT THE CLUB WITH SOME FRIENDS. HE WASN'T SURE BECAUSE IT WAS A MONTH AGO. THEN HE STATED HE WASN'T AT THE CLUB WITH BERT. HE WAS AT THE CLUB WITH PHIL BEVINS, VEGA, AND MIKE VANHOOS. WHEN ASKED, HE EXPLAINED PHIL BEVINS IS ONE OF THE SHIPS IN CHARLESTON, HE COULDN'T REMEMBER THE NAME OF THE SHIP, HE SAID VANHOOS AND WHEN HE ASSIGNED TO THE USS WAGAN.

SUBJECT WAS CONFRONTED WITH THE REPORT THAT HE STATED HE WON \$50.00 FROM SHACKLETON PLAYING POOL ON THE NIGHT HE WAS KILLED. SUBJECT DENIED PLAYING POOL WITH SHACKLETON AND HE DENIED WINNING \$50.00 FROM HIM. WHEN ASKED HOW HE FEELS WHEN SOMEONE DOES NOT PAY HIM AFTER HE WINS A GAME, HE STATED HE DOESN'T GET UPSET, HE JUST CRANKS IT UP AND FORGETS ABOUT IT.

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: DAVIS, ROBERT LEE/CSM USN
CON: 000000-0000-0000-0000

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SUBJECT WAS ASKED ABOUT THE BLOOD THE SUBJECT IN HIS COFFIN LOCKER. SUBJECT STATED HE HAD HIS WISDOM TEETH REMOVED ON TUESDAY 25 OCT 68, AND THEY WERE DRAINING. HE SAID THE DENTIST PUT GAUZE IN THE HOLES, BUT HE GAGGED ON THEM WHEN HE WAS SLEEPING, SO HE PUT TOWELS UNDER HIS HEAD WHEN HE LAYED DOWN. WHEN THEY BECAME FULL OF BLOOD, HE THREW THEM AWAY AND GOT THE TEETH SET OUT. HE STATED HIS BILLOW CASE AND BED SHEETS PROBABLY HAVE BLOOD ON THEM TOO BECAUSE HE HADN'T HAD TIME TO HAVE THEM WASHED. HE STATED HE HUNG THE TEETH SHIRT OVER THE PIPE ABOVE HIS BACK UNTIL IT DRIED, THEN HE PUT IT IN HIS LOCKER. WHEN ASKED HOW SOMEONE ELSE'S BLOOD COULD GET ON THE TEETH SHIRT, HE SAID HE HAD NO IDEA. WHEN ASKED IF ANYONE ELSE HAS ACCESS TO HIS LOCKER, HE SAID NO, HOWEVER ONE DAY ABOUT THREE WEEKS AGO, JAMES BECK SAW HIM OPENING HIS LOCKER, AND SHOWED HIM HE COULD OPEN THE LOCK NOW. SUBJECT STATED THAT BECK WAS JUST PLAYING AROUND AND HE DID NOT THINK BECK WOULD EVER GO INTO HIS LOCKER FOR ANY REASON.

AT 1743, SUBJECT MADE A COMMENT THAT MAYBE HE SHOULD TALK TO A LAWYER. ALL QUESTIONING STOPPED. SUBJECT WAS ASKED IF HE WAS REQUESTING A LAWYER. HE SAID NO. SUBJECT WAS INFORMED THAT THERE WAS NO WAY HE WERE GOING TO VIOLATE HIS RIGHT TO A LAWYER, IF HE WANTED ONE. HE SAID HE DID NOT WANT A LAWYER AT THAT TIME. SUBJECT ADDED THAT HE DIDN'T NEED A LAWYER BECAUSE HE DIDN'T KILL THE GUY, AND IF HE DID KILL THE GUY, HE WAS THE TYPE OF PERSON THAT HAD TO TELL SOMEONE.

SUBJECT THEN BROUGHT UP A CONVERSATION HE HAD WITH DAVE GUIDRY, A NAVY PETTY OFFICER ASSIGNED TO THE USS MAHAN. SUBJECT SAID HE WAS HAVING A CONVERSATION WITH GUIDRY AND HE TOLD GUIDRY THAT THE GUY THAT GOT KILLED BEHIND THE COMMISSARY WAS KILLED WITH A POOL STICK. WHEN ASKED WHY HE SAID THAT HE SAID HE LIKED TO MESS WITH PEOPLE AND MAKE THEM THINK HE KNEW MORE THAN THEM. WHEN ASKED WHY HE SAID THE GUY WAS HIT AND JABBED WITH A POOL STICK, HE SAID JUST TO MAKE IT SEEM MORE REALISTIC. HE ADDED THAT HE HEARD THE GUY WAS KILLED AND DECIDED TO ADD THE INFORMATION. WHEN HE FINISHED THE SENTENCE, HE CHANGED HIS STATEMENT AND SAID (WADE) BIELBY TOLD HIM THE DETAILS ABOUT THE POOL STICK.

SUBJECT THEN ADDED THAT HE THOUGHT HE KNEW WHO DID KILL THE GUY. HE SAID "JEFF KAISER." HE CONTINUED BY SAYING THAT KAISER DIDN'T GO TO THE CLUB FOR ALMOST A MONTH AFTER THE KILLING BECAUSE HE WAS SCARED, HE WAS SCARED BECAUSE HE WAS "DOING ACID" THAT NIGHT AND HE WAS AFRAID HE DID SOMETHING HE MIGHT NOT REMEMBER. SUBJECT AGAIN STATED HE DID NOT KILL THE GUY. BECAUSE IF HE HAD, HE WOULD HAVE HAD TO TELL SOMEONE. WHEN SUBJECT WAS TOLD THAT HE DID TELL SOMEONE AND THAT PERSON HAS COME FORWARD AND PROVIDED A SWORN STATEMENT TO US ABOUT THE KILLING, SUBJECT STATED HE WANTED A LAWYER BEFORE HE SAID ANYTHING ELSE.

EXHIBIT

(1) SUBJECT'S WAIVER OF RIGHTS REMOVED

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U.S. NAVAL INVESTIGATIVE SERVICE

REPORT: S/DAY'S, ROBERT LEE/OSBY USN
 COM: 030003-0300-0300-7000A

REPORTING AGENT: DEANMARIE V. SEWELL
 OFFICE: MISSA CHARLESTON, SC
 DATE PREPARED: 04NOV83
 DATE INDEXED: 01NOV83

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CHRONOLOGICAL RECORD OF MEDICAL CARE

HEALTH RECORD

SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)

DATE: 5 JUL 1988 OSUW-JWS BRANCH CLINIC CHARLESTON, SC 29408

EXAMINED THIS DATE IN ACCORDANCE WITH ARTICLE 15, REGULATION 1 AND FOUND TO BE PHYSICALLY QUALIFIED FOR TRANSFER.

Richard Curry HRS
MILREP, 248431688

210583

Squadron MC - NP Good

Avoid to see this 21 July 88 - 1 1/2 yrs AD Swine for NP and since going the way, he has consistently been in trouble - at very small / whole / but says that he has been it, he has negatively gone to work for various officers (USA, doing it perfectly, doing it, etc.) He was also in trouble in the last year to coming into NIS but would not give specifics during interview. He dropped out of High School in 3rd year before graduation because he was "bored of it" although since he would have passed -> went to FLA for 1 month in girlfriend at that time. Eventually went back to hometown in Ohio & got GED prior to military. Moved out of home when father died (he was 17) & into an "off" & apparently had a very poor relationship to parents & family. He has been under suspicion for a # of offenses, including sitting near a supplier abroad ship, but nothing was proven. He is currently being investigated by NIS as a suspect in next murder that occurred on base, although he denies involvement.

Swine record not available for my review in NIS has it?

(Copy)

for

PATIENT'S IDENTIFICATION (Use this space for Mechanical Imprints)

RECORDS MAINTAINED	PATIENT'S NAME (Last, First, Middle Initial)			SEX
	Davis, Robert Lee			Male
	RELATIONSHIP TO SPONSOR	STATUS	ORGANIZATION	
		USN	USN	
	SPONSOR'S NAME	ORGANIZATION		
		USS Maryland		
DEPT./SERVICE IDENTIFICATION NO.	IC 1000			
DDO	302-60-5400			

CHRONOLOGICAL RECORD OF MEDICAL CARE STANDARD FORM 100-108
Approved by: [Signature] Date: 248431688

Operations Specialist Second Class Ronald S. Mull, U.S. Navy, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your rank and full name.

A. I'm an OS2, E-5, Ronald Scott Mull.

Q. OS2 Mull, what is your unit?

A. USS Mahan.

Q. Do you know the accused in this case?

A. Yes, sir, I do.

Q. If he's in the courtroom today, would you point to him and state his name?

A. [Pointing towards accused.] Robert Lee Davis.

Q. Petty Officer Mull, how do you happen to know the accused?

A. He was assigned to OI Division on board the same ship I'm on, the USS Mahan.

Q. About long have you been assigned to the Mahan, OS2 Mull?

A. Approximately a year and a half.

Q. And were you – you were assigned to the Mahan in October of 1988?

A. I was assigned to the Mahan, yes, sir.

Q. What about the accused? Was he aboard the Mahan in October of 1988?

A. Yes, sir, he was.

[746] Q. Do you work in the same division as the accused?

A. Yes, sir.

Q. What's your relationship to him?

A. We were very close friends.

Q. Directing your attention to late October of 1988. Did you have occasion to speak with the accused?

A. Yes, sir, I did.

Q. And do you remember the circumstances of that?

A. Yes, sir, I do.

Q. About when was this discussion?

A. Thursday, the 27th of October.

Q. And where did this discussion take place?

A. It was down in the berthing area on board the Mahan.

Q. Go ahead and describe the circumstances, how you happened to be there.

A. All right. I had been out on liberty earlier that night and I was returning to the ship. I was walking through the passageway and I saw Davis in the passageway, he was also returning from liberty. And we just started talking in the passageway. We just walked on down toward berthing and we got down to berthing we kept talking. At first it was small talk. Then the investigation came up. I don't really remember who brought it up.

Q. What investigation are you speaking of?

A. NIS had been coming to the Ship, talking to Davis.

Q. Do you know what the investigation was about?

A. It was kind of general knowledge, you know, that it was about the guy that had got killed over behind the commissary.

Q. Do you know if they talked to Seaman Davis?

A. Yes, sir, I do. I knew that they had talked to him.

Q. NIS?

A. Yes, sir.

Q. What happened after the topic of the investigation came up?

A. Well, I asked him what he really had to do with the investigation and he said they were investigating him for the murder of this guy. And then I asked him straight out did he—did he kill the guy and he looked at me and said, "Yes, I did." You know, it kind of really shocked me at first. I was—I was expecting a no answer from him, you know, him being a very close friend of mine. And then I [747] asked him, you know, kind of what happened and he went on to tell me exactly what happened that night.

Q. What did he tell you in that regard?

A. He told me he was at the EM Club on base and he had been playing pool with a guy and he said he beat the guy out of \$30.00 playing pool and the guy didn't want to pay him the money and they got into some kind of an argument about it and the guy made a smart remark to him or something of that nature. And he said—he wasn't really clear about how they got together outside the club, but later on that night somehow they—they got together outside the club and started fighting. He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. I don't know exactly how he left the base, on foot or what. He said he went to a girlfriend's house. And he said at this girlfriend's house he burned his clothes in a fireplace. He changed his clothes over there at his girlfriend's house. He apparently had been seeing her for some time; he had some extra clothes over there. And he said something about he had—he had an alibi that night though, and he wasn't really worried

about it. He said he was seen with (I don't know if it was the same girl) some girl at the club. A lot of people had seen him there at the club with some girl. Said he had an alibi.

Q. Did he say anything about leaving the club?

A. I can't really remember whether he said he left with someone or not.

Q. Do you remember if he said anything about anyone seeing him leave the club?

A. I can't really remember.

Q. What about his pool cues? Did he mention anything about them?

A. Yes. He said that NIS had his — had taken his pool cues and he said there was some stains on them and he said that they had some — that one pool cue had a stain on it. He said he tried to wash — said it had blood on it, said he tried to wash it off and sand it off, but he said there was one stain he couldn't get off and NIS was like testing the blood on the stick. He said he wasn't worried about it because the guy had the same blood type that he did. I don't know how he knew that, but that's what he said.

Q. Did you make a statement concerning your conversation with Seaman Davis?

A. Yes, sir, I did.



EXHIBIT 3

TITLE: MISS/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

INVESTIGATIVE ACTION: INTERVIEW OF JESSICA S. WHITE

ON 11DEC88, JESSICA S. WHITE WAS INTERVIEWED AT HER RESIDENCE, 631 ROBINSON RD, WOOSTER, OHIO, BY REPORTING AGENT AND PARTICIPATING AGENT MCGRANAGHAN. MISS WHITE'S MOTHER, PATRICIA A. WHITE WAS AT THE RESIDENCE AND PRESENT DURING PORTIONS OF THE INTERVIEW. UPON INTERVIEW, MISS WHITE STATED THAT SHE AND SUBJECT DAVIS HAD DATED FROM APPROXIMATELY 15 JUN 86, UNTIL SUBJECT ENTERED THE USN.

MISS WHITE STATED SHE HAD NEVER BEEN IN A SERIOUS AUTOMOBILE ACCIDENT. SHE FURTHER STATED THAT THE ONLY ACCIDENT SHE HAD EVER BEEN IN WAS A MINOR ACCIDENT, DURING WHICH HER MOTHER WAS DRIVING.

REGARDING SUBJECT ALLEGEDLY KILLING SOMEONE, WITH A PAIR OF NUN-CHUCKS, MISS WHITE STATED THAT SUBJECT OWNED A PAIR OF NUN-CHUCKS BUT SHE HAD NO KNOWLEDGE OF HIM KILLING OR ASSAULTING ANYONE WITH THE NUN-CHUCKS.

MISS WHITE CONFIRMED THAT SUBJECT DID NOT OWN OR HAVE ACCESS TO A VEHICLE, WHILE SHE KNEW HIM.

MISS WHITE STATED SHE HAD NEVER BEEN RAPED. HOWEVER, SHE RELATED THAT ONE EVENING IN 1986, WHILE SHE WAS DATING SUBJECT, SHE HAD GONE TO THE HOME OF HER FORMER GIRLFRIEND, JILL GREENWALD. JILL'S PARENTS WEREN'T HOME AND JILL'S BOYFRIEND "TROY" WAS AT JILL'S HOUSE, WITH HIS FRIEND. MISS WHITE COULD NOT RECALL THE NAME OF TROY'S FRIEND BUT, DESCRIBED HIM AS APPROXIMATELY 35 YEARS OLD. MISS WHITE STATED THAT JILL AND TROY HAD LEFT, TO GET SOME BEER, LEAVING HER ALONE WITH TROY'S MALE FRIEND. MISS WHITE STATED THAT TROY'S MALE FRIEND DID NOT RAPE HER BUT, HE UNSUCCESSFULLY TRIED TO SEXUALLY FORCE HIMSELF ON HER. MISS WHITE ADVISED SHE HAD TOLD SUBJECT ABOUT THE INCIDENT AND HE LATER INFORMED HER THAT HE "BEAT THE GUY UP" BUT, SHE NEVER SAW ANYTHING ABOUT IT IN THE LOCAL NEWSPAPER. MISS WHITE STATED SHE DID NOT RECALL TROY'S LAST NAME AND HAD NOT HAD CONTACT WITH HIM FOR OVER A YEAR. SHE NOTED SHE HAD HEARD THAT TROY MAY NOW BE HOMOSEXUAL. SHE FURTHER STATED THAT JILL GREENWALD HAD MOVED AND THEY NO LONGER MAINTAINED CONTACT. SHE AGREED TO ATTEMPT TO OBTAIN AN ADDRESS OR TELEPHONE NUMBER FOR GREENWALD. ON 13 DEC 88, MISS WHITE STATED SHE BELIEVED THE GREENWALDS WERE STILL IN THE WOOSTER AREA, WITH AN UNLISTED TELEPHONE NUMBER. SHE HAD NOT BEEN ABLE TO OBTAIN THEIR LOCAL ADDRESS.

MISS WHITE ADVISED SHE HAD NOT HEARD FROM SUBJECT FOR APPROXIMATELY A YEAR.

MISS WHITE IDENTIFIED PAUL HESS, JASON HOUGHINS AND BOB ALEXANDER AS FORMER FRIENDS OF SUBJECTS.

REPORTING AGENT: CHARLES D. BENO
OFFICE: MISRA CLEVELAND, OHIO
DATE TYPED: 21DEC88

RIGHTS HE HAD BEEN IN. ADDITIONALLY, MR ZIMMERMAN RECALLED THAT DAVIS FREQUENTLY WOULD MAKE THREATENING COMMENTS SUCH AS "I'LL GET HIM THIS WEEKEND." MR ZIMMERMAN STATED THAT DAVIS WAS A VERY ENERGETIC BOY WITH 'SO MUCH ENERGY' HE DID NOT KNOW WHAT TO DO WITH HIMSELF'. HOWEVER, WHEN DAVIS DID WORK HARD AT PRACTICE, SO THAT HE WAS TIRED, HE (DAVIS) WOULD BECOME CALMER AND BETTER BEHAVED. MR ZIMMERMAN CATEGORIZED DAVIS AS BEING ORNERY AND ILL TEMPERED. CONCERNING DAVIS' WORK HABITS, MR ZIMMERMAN STATED THAT HE WOULD DO WHAT HE NEEDED TO TO GET A "D".

MRS DIANE MCCARTNEY, ENGLISH TEACHER AT WEST HOLMES HIGH SCHOOL, RECALLED DAVIS AS A STUDENT. MRS MCCARTNEY STATED THAT DAVIS WAS ONE OF THE ONES YOU DON'T FORGET. "HE MADE ME FEEL UNCOMFORTABLE (AFRAID)". MRS MCCARTNEY RECALLED ONE INCIDENT WHICH SHE STATED WAS RATHER TYPICAL OF DAVIS' BEHAVIOR. DAVIS USED A BALL POINT PEN TO STAB HIS HAND/FINGERS SO HE WAS BLEEDING. THEN DRIPPED HIS BLOOD ON TO HIS DESK UNTIL THE ENTIRE DESK WAS COVERED. MRS MCCARTNEY RECALLED THAT SHE AND DAVIS' OTHER TEACHERS WERE INSTRUCTED BY THE SCHOOL ADMINISTRATION NOT TO LET DAVIS OUT OF CLASS ALONE. THE OTHER STUDENTS PICKED ON HIM BECAUSE OF THE UNUSUAL THINGS HE WOULD DO, MRS MCCARTNEY STATED AND OPINED THAT DAVIS DID MANY THINGS JUST TO GET ATTENTION. WHEN DAVIS TRANSFERRED TO WOOSTER HIGH SCHOOL, MRS MCCARTNEY STATED THE ENTIRE WEST HOLMES STAFF WAS RELIEVED AND JOKED ABOUT CALLING THEIR WOOSTER COUNTERPARTS TO WARN THEM ABOUT DAVIS. MRS MCCARTNEY STATED SHE HEARD MANY STORIES ABOUT DAVIS, ONE SHE RECALLED WAS THAT HE HAD SHOT HIMSELF IN THE FOOT IN THE PARKING LOT OF A MALT SHOP IN FRONT OF A GROUP OF OTHER STUDENTS. ALSO, MRS MCCARTNEY RECALLED THAT DAVIS' SISTER, RHONDA, WAS AFRAID OF HIM, BUT MRS MCCARTNEY STATED THAT THIS WAS ONLY SOMETHING THAT SHE HAD HEARD AND THAT SHE HAD NO FIRST HAND KNOWLEDGE OF THE SISTER'S FEELINGS.

REPORTING AGENT: LUKE MCGRANAGHAN
OFFICE: NISRA CLEVELAND, OHIO
DATE TYPED: 20DEC88



WEST HOLMES HIGH SCHOOL

Route 1
Millersburg, Ohio 44654

NOTICE OF INTENDED SUSPENSION

Bob Davis
Name of Student

MAY 23, 1985
Date

You are hereby advised that it is my intention to suspend you from school and/or school activities. The reason(s) for this intended suspension are as follows:

THROWING AIRPLANE IN STUDY HALL.
CARRY STOLEN AND KNIFE. THREATENING
TO BEING DYNAMITE TO WEST HOLMES HS.
SUSPENDED MAY 24 TO JUNE 3, 1985

You will have the opportunity for an informal hearing before me to challenge the reason(s) for the suspension or otherwise explain your actions.

Jacklin Reeth
Signature of School Official

I hereby acknowledge receipt of this notice of intended suspension.

Bob Davis
Signature of Student

I understand the reasons for my suspension.

Bob Davis
Signature of Student

[1565] Q. What's your position here at the Naval Station?

A. Chaplain. [LCDR James A. Julius]

Q. What is your educational background, sir?

A. Well, I'm a graduate—I have a bachelor's degree in Scholastic Philosophy from Cardinal Glennon College. I have a graduate degree in Theology from Kenwick Seminary. I attended St. Louis University. I have a Master's Degree from the University of Notre Dame.

Q. Chaplain, how much contact have you had with Seaman Davis?

A. I have seen Seaman Davis about four to five times a week since he has been incarcerated.

Q. What type of contact have you had with him during those four to five times a week?

A. Very close.

Q. Chaplain, if you would, tell the members what you know of Bob Davis based upon your contact with him.

A. I think that Seaman Davis is impaired by way of some terrible psychological problems that started, not when he came into the Navy, but in my opinion, when he was very, very young. He is adopted. I don't know what happened before the adoption. When I was—I would best describe him by alluding to some of my own experiences.

TC: The government is going to object on the grounds of relevance and hearsay, Your Honor.

DC: I believe it is relevant to provide information regarding the accused to the members and perceptions of this young man, based upon his contact with him, four to five days a week over the last several months.

MJ: Very well. The members will understand that this is information gleaned by the chaplain during counseling with the accused. Is that a fair statement, Chaplain, that that is what you are basing your testimony on?

WITNESS: Yes, sir.

WITNESS: I think that Seaman Davis has lived in a dream world. I think very few people know him underneath the braggart type of immature coating that he puts on with everybody that he meets. It is very difficult to penetrate that. By a dream world, I mean such outlandish things that he once confided in me that he beat Michael Jordan at basketball, he knocked out Mohammed Ali, and in his time in the brig, in the cell, he confided in me that he once had sex three times in one [1566] day in the cell. This is his normal mode of operation. Very few people get underneath that. He needs great help, has needed great help for many years.

TC: Your Honor, the government is going to object on the basis of relevance. There is no issue of mental impairment or anything that was raised at trial and the government contends that none exists.

MJ: Well, the chaplain is a counselor. He is a consultant with the accused, the members may hear the testimony of the chaplain. You may proceed, please, Mr. Yandle. You will certainly have an opportunity to examine Father Julius.

Q. Chaplain, if you could complete that thought regarding the necessity for treatment.

A. He is in dire need of, and he has been dire need of medical assistance for many, many years. I'm sure you are aware of his record, or you will be. It is a shame that the young man was ever allowed to be in the United States Navy.

DC: Thank you, sir, we have no further questions at this point.

MJ: Questions, Captain or Mr. Roach, of the Commander, please?